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# JUSTICE'S ANTITRUST DIVISION

# Better Management Information Is Needed on Agriculture-Related Matters



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**Abstract**
The Department of Justices Antitrust Division (Division) investigates and prosecutes civil and criminal violations of federal antitrust laws. The basic federal antitrust statutes are the Sherman Act, as amended (15 U.S.C. 1-7); and the Clayton Act, as amended (15 U.S.C. 12-27). The acts objectives are to prevent anticompetitive behavior and preserve and promote competition in the marketplace. The Division generally shares responsibility for enforcing federal antitrust laws with the Federal Trade Commission (FTC) and state attorneys general. 1 Both the Division and FTC are responsible for enforcing the premerger notification provisions of the Hart-Scott-Rodino Act (HSR Act), 2 which requires parties to notify the Division and FTC of certain proposed mergers and to observe a waiting period before merging. During fiscal year 1999, the Division handled over 4,900 matters, 3 of which 4,642 (about 95 percent) were potential mergers filed under the notification provisions of the HSR Act. This report responds to a request from Senator Grassley, as the former Chairman of the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary, that we obtain information on the Divisions overall policies and procedures for carrying out its statutory 1 Section 4C of the Clayton Act (15 U.S.C. 15c) authorizes state attorneys general to bring civil actions in the name of a state on behalf of resident consumers who have been injured as a result of a Sherman Act violation. In addition,

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**A**bbreviations

| | |
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| AAG | Assistant Attorney General |
| AMIS | Antitrust Management Information System |
| AMS | Agricultural Marketing Service |
| CCTS | Correspondence and Complaint Tracking System |
| CID | Civil Investigative Demand |
| DAAG | Deputy Assistant Attorney General |
| ERS | Economic Research Service |
| FBI | Federal Bureau of Investigation |
| FOIA | Freedom of Information Act |
| FTC | Federal Trade Commission |
| GIPSA | Grain, Inspection, Packers, and Stockyards Administration |
| HHI | Herfindahl-Hirshman Index |
| HSR | Hart-Scott-Rodino |
| MOU | Memorandum of Understanding |
| MTS | Matter Tracking System |
| PI | Preliminary Inquiry |
| SIC | Standard Industrial Classification |
| TEA | Transportation, Energy and Agriculture |
| USDA | United States Department of Agriculture |

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**United States General Accounting Office**
**Washington, DC 20548**

April 6, 2001

The Honorable Jeff Sessions
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate

The Honorable Charles E. Grassley
United States Senate

The Department of Justice's Antitrust Division (Division) investigates and prosecutes civil and criminal violations of federal antitrust laws. The basic federal antitrust statutes are the Sherman Act, as amended (15 U.S.C. 1-7); and the Clayton Act, as amended (15 U.S.C. 12-27). The acts' objectives are to prevent anticompetitive behavior and preserve and promote competition in the marketplace. The Division generally shares responsibility for enforcing federal antitrust laws with the Federal Trade Commission (FTC) and state attorneys general.[1] Both the Division and FTC are responsible for enforcing the premerger notification provisions of the Hart-Scott-Rodino Act (HSR Act),[2] which requires parties to notify the Division and FTC of certain proposed mergers and to observe a waiting period before merging. During fiscal year 1999, the Division handled over 4,900 matters,[3] of which 4,642 (about 95 percent) were potential mergers filed under the notification provisions of the HSR Act.

This report responds to a request from Senator Grassley, as the former Chairman of the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary, that we obtain information on the Division's overall policies and procedures for carrying out its statutory

[1]Section 4C of the Clayton Act (15 U.S.C. 15c) authorizes state attorneys general to bring civil actions in the name of a state on behalf of resident consumers who have been injured as a result of a Sherman Act violation. In addition, Section 4 of the Clayton Act (15 U.S.C. 15) authorizes private parties "injured in [their] business or property by reason of anything forbidden in the antitrust laws" to sue the offending parties and recover three times their actual damages, costs, and reasonable attorney's fees.

[2]Section 7A of the Clayton Act (15 U.S.C. 18a), enacted as part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, is commonly referred to by that name.

[3]In this report, we use the term "matter" to mean any inquiry, investigation, or filing by the Division before a civil or criminal court.

responsibilities, particularly as they apply to the Division's enforcement activities in the agriculture industry. Specifically, as agreed with Senator Grassley's office, our objectives were to

- describe the Division's interaction with FTC and the U.S. Department of Agriculture (USDA) with regard to antitrust matters in the agriculture industry;
- provide information on the number of complaints and leads in the agriculture industry received by the Division for fiscal years 1997 through 1999; and
- provide information on the number and type (such as mergers) of closed matters in the agriculture industry for fiscal years 1997 through 1999.

As also agreed, in appendix III, we describe the Division's policies and procedures for investigating potential antitrust violations.

## Results in Brief

According to Division, FTC, and USDA officials, their agencies maintain a cooperative working relationship with regard to anticompetitive matters in the agriculture industry. This interaction with respect to specific matters centers on their agencies' responsibilities to investigate antitrust matters. The Division and FTC share responsibility for enforcing antitrust laws. Their interaction generally occurs through their clearance procedures, which is the process established between them to determine which agency will investigate potential antitrust violations. According to agency officials, in recent years, the Division and USDA have worked together in a number of respects. For example, the Division obtains useful information about agricultural markets from USDA's Agricultural Marketing Service (AMS) and Economic Research Service (ERS).

The Division estimates that 165 complaints and leads related to the agriculture industry were received in fiscal years 1997 through 1999. The five legal sections or task forces[4] and seven field offices that could potentially have handled such complaints and leads used different systems for tracking complaints and leads and captured varying levels of detail in their systems. One of the sections—the one specifically responsible for agricultural commodities and that received the largest number of agriculture-related complaints and leads—did not require its staff to document and track all complaints and leads. Consequently, Division

[4]Hereafter this letter refers to sections and task forces as sections.

officials could provide only estimates of the number of complaints and leads the Division received.[5] During the course of our review, the Division issued revised guidance to improve its documentation of complaints and leads, requiring all sections and field offices to use the Division's Correspondence and Complaint Tracking System (CCTS) for recording complaints and leads. However, the revised guidance does not include guidance on the information that staff are required to document on each contact, and the CCTS does not include specific fields to capture information on Standard Industry Classification (SIC) codes or the final outcome of complaints and leads received. These limitations, combined with past history, indicate that information may still be collected and recorded inconsistently by the sections and field offices.

The Division's primary source of information on matters received and closed is the Matter Tracking System (MTS), which is also used to support Division management and budget reports. However, MTS data on matter status—such as date closed or whether the matter was closed immediately or after some period of investigation—are not reliable because of inconsistencies. We had to adjust the data from MTS to ascertain the general status of matters handled by the Division. These data show that during fiscal years 1997 through 1999, the Division closed 1,050 matters involving mergers and potential antitrust violations in the agricultural industry. Of these 1,050 matters, 935 (89 percent) were potential mergers filed under the premerger notification provisions of the HSR Act. Of these 935 filings, 827 (88 percent) expired within the minimum prescribed time period that the parties must wait before the transaction can proceed.[6] The Division took no formal action, such as opening a preliminary inquiry, beyond reviewing the documents submitted by the merging parties and public sources of information for these 827 matters—a normal outcome for mergers that are permitted to proceed after the required premerger notification period.

[5]In 1991, we reviewed the Division's criminal cases and found that the Division had a policy for documenting information on complaints and leads from the public. However, the Division did not know how many complaints it had received, nor did it have complete data on their characteristics because this policy was not always followed for complaints or leads the Division decided not to investigate. *Antitrust: Information on Criminal Cases* (GAO/GGD-92-21FS, Dec. 17, 1991).

[6]The initial waiting period is 15 days for cash tender offers and bankruptcy sales and 30 days for other transactions.

This report includes four recommendations to the Attorney General to improve the Division's documentation and tracking of complaints and leads and the MTS database. In commenting on our report, the Division stated that our recommendation to incorporate a data field for SIC codes into the CCTS was reasonable and that it would also consider our recommendation to link the CCTS to MTS to enable the Division to track the results of citizen's complaints. The Division was silent on our recommendation that it monitor compliance with the November 27, 2000, policy regarding documenting and tracking public inquiries. However, the Division took issue with our recommendation to correct errors and improve the accuracy and reliability of MTS data.

## Background

The Division is responsible for promoting and maintaining competition in the American economy by enforcing the federal antitrust laws. To accomplish its mission, the Division has 16 sections in headquarters and 7 field offices located throughout the United States. As of July 21, 2000, the Division had 561 full-time staff and 237 part-time staff onboard; about 29 percent of the full-time staff and about 21 percent of the part-time staff were assigned to the field offices (see app. II for a breakdown of staffing by sections and field offices). The Division's budget authority for fiscal year 2000 was $114.4 million, about a 16-percent increase, in nonconstant dollars, over fiscal year 1999 funding of $98.3 million. The Division's appropriations are offset by the fees companies are required to pay when they file premerger notifications under the HSR Act.

The Division is responsible for enforcing the antitrust laws throughout the economy, including industries, such as computers, health care, telecommunications, transportation, and agriculture. Overall, the Division handled over 4,900 matters during fiscal year 1999, 4,642 (about 95 percent) of which were proposed mergers for which notice was filed under the HSR Act. For fiscal year 1999, agricultural industry matters—both mergers and nonmergers—represented about 8 percent (395) of the Division's total workload.

As previously noted, the basic federal antitrust statutes are the Sherman Act and the Clayton Act. Section 1 of the Sherman Act makes illegal any contract, combination, or conspiracy that results in a "restraint of trade." The courts have construed the term to cover a variety of horizontal and

vertical trade restraining agreements. Horizontal restraints[7] are agreements among competitors at the same level of the production, distribution, or marketing process. Vertical restraints[8] are arrangements among persons or firms operating at different levels of the manufacturing-distribution-marketing chain that restrict the conditions under which firms may purchase, sell, or resell. Section 2 of the Sherman Act prohibits monopolization, as well as attempts, combinations, or conspiracies to monopolize. Although the Sherman Act is both a criminal and civil statute, it is the Division's policy to criminally prosecute only what the Division considers to be the most egregious per se Sherman Act violations.[9] However, in some situations the Division may not deem criminal investigation or prosecution to be appropriate, even though the conduct may appear to be a per se violation of the law. As examples, the Antitrust Division manual, which outlines the Division's formal internal practices and procedures, cites situations in which (1) there is confusion in the law; (2) there are novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their actions.

Section 7 of the Clayton Act prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly in any market. The HSR Act added section 7A to the Clayton Act, which requires premerger notification of proposed mergers to assist the Division and FTC in investigating whether they would be anticompetitive.

The Division generally shares responsibility for enforcing federal antitrust laws with FTC and state attorneys general. With the exception of criminal

[7]Horizontal restraints include agreements among competitors to (1) fix prices, (2) engage in bid rigging, (3) allocate markets, and (4) refuse to deal or participate in a boycott. These restraints can also include certain competitor mergers and acquisitions and anticompetitive joint ventures.

[8]Vertical restraints of trade analyzed for possible illegality under the antitrust laws include (1) exclusive dealing agreements, (2) restrictions on the territory in which a manufacturer's distributor may sell and restrictions concerning the customers with whom a distributor may deal, (3) restrictions on the location of a distributor's place of business or area of operations, (4) vertical price fixing, (5) vertical mergers and stock acquisitions, and (6) tying arrangements or requirements. Under a tying arrangement, a seller requires that the buyer of a good or service purchase a second, distinct good or service as a condition of purchasing the first.

[9]A per se Sherman Act violation is one in which proof of the existence of the conduct is enough to establish its illegality.

enforcement of the Sherman Act, which the Division has sole authority for, the "unfair methods of competition" clause of section 5 of the FTC Act generally allows FTC to reach the same conduct as prohibited by the Sherman Act. Both the Division and FTC are responsible for enforcing Sections 7 and 7A of the Clayton Act, with the exception of certain industries in which FTC's jurisdiction is limited by statute. For example, Section 5 (a) (2) of the Federal Trade Commission Act of 1914[10] generally excludes from its coverage activities subject to the Packers and Stockyards Act.[11] FTC also enforces the Robinson-Patman Act, [12] which governs price discrimination in interstate commerce, and section 8 of the Clayton Act (15 U.S.C. 19), which governs interlocking directorates.

As previously noted, the Division is responsible for enforcing the antitrust laws in a broad range of industries. The antitrust laws apply generally throughout the economy, and the Division exercises prosecutorial discretion to determine which matters warrant investigation or enforcement action. According to Division officials, their principal expertise is in antitrust laws, not in specific industries. Some industries also are regulated by government agencies under statutes that go beyond the antitrust laws to establish additional, industry-specific regulatory requirements and standards. For example, USDA's Grain Inspection, Packers, and Stockyards Administration (GIPSA) regulates sales in the livestock and meat-packing industries. GIPSA generally has the authority to prohibit unfair trade primarily within the livestock industry.

The Division's policies and procedures manual outlines the processes for investigating potential antitrust violations. Depending on the conduct alleged, the Division can initiate either civil or criminal investigations of

[10]15 U.S.C. 45(a)(2). The Federal Trade Commission Act, as amended (15 U.S.C. 41-58) created the FTC and authorized the Commission to, among other things, (a) define and prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress.

[11]The Packers and Stockyards Act of 1921 (7 U.S.C. 181 *et seq.*) was enacted to ensure fairness and competitiveness in the livestock, meat, meatpacking, and poultry industries by preventing fraudulent, discriminatory, or anticompetitive practices.

[12]15 U.S.C. 13.

these potential violations. The Division may identify possible antitrust violations or proposed mergers through a variety of sources. The Division is made aware of many proposed mergers through filings required of the merging parties by the HSR Act. The Division may learn of a possible antitrust violation from a confidential informant, individuals, or corporations applying for amnesty;[13] complaints and referrals from other government departments or agencies; anonymous tips; or through reviews of newspapers, journals, and trade publications. It may develop information about potential criminal violations through grand jury proceedings. As previously noted, more detailed information and flow charts of the Division's enforcement procedures can be found in appendix III.

## Scope and Methodology

Our objectives were to (1) describe the Division's interaction with FTC and USDA with regard to antitrust matters in the agriculture industry, (2) provide information on the number of complaints and leads in the agriculture industry received by the Division for fiscal years 1997 through 1999, and (3) provide information on the number and type of agriculture-related matters closed by the Division for fiscal years 1997 through 1999.

As agreed with Senator Grassley's office, we used SIC codes selected by the Division to define the agriculture industry (see app. I). The SIC codes selected included only those codes specifically related to plant and animal products that originate on land and are commercially cultivated or raised for human or animal consumption.[14]

To obtain information on the Division's interaction with FTC and USDA, we interviewed officials in the Division, FTC, and USDA. We also reviewed the Division's policies and procedures for interacting with other agencies, including relevant interagency agreements.

The Division does not maintain divisionwide data on complaints and leads related to possible anticompetitive practices in the agriculture industry. To

[13]The Division also identifies antitrust violations through its Corporate and Individual Leniency Policies program, also referred to as the amnesty program. According to Division officials, this program has been in place since the 1980s, and it was expanded in 1993 to make it easier and more attractive for companies to come forward and cooperate with the Division.

[14]According to Division officials, they had to make a number of subjective judgments to identify SIC codes related to the agriculture industry.

obtain an estimate of the number of agriculture-related complaints and leads received in fiscal years 1997 through 1999, we interviewed the section or field office chief, assistant section chief, and other knowledgeable Division officials for each of the five legal sections and seven field offices that potentially handle matters in the agriculture industry during this period. These officials provided information on the number of complaints and leads received and the methods they used to record and track them.

To gather information on the number and type of matters closed in the agriculture industry in fiscal years 1997 through 1999, we obtained data on the characteristics of the matters for selected SIC codes and for the relevant time period from the Division's MTS. However, some of the data in MTS were not accurate and reliable. For example, actions were shown as being taken on matters after the matter had been recorded as closed, or links were not being established between related matters. We also reviewed opening and closing memorandums for matters that were closed without the filing of a complaint to determine the reasons for closing the matters. We did not attempt to determine the appropriateness of the Division's prosecutorial decisions.

More detailed information about our scope and methodology can be found in appendix I. We performed our work in Washington, D.C., between October 1999 and February 2001, in accordance with generally accepted government auditing standards.

## Division's Interaction with FTC and USDA

As noted earlier, the basic federal antitrust statutes are the Sherman Act and the Clayton Act, and the Division generally shares responsibility for enforcing the antitrust laws with FTC. The interactions between the agencies are generally limited to their roles in enforcing antitrust laws. Officials from the Division, FTC, and USDA said that their agencies maintain a cooperative working relationship with regard to anticompetitive matters in the agriculture industry. According to Division and FTC officials, their agencies' interactions with respect to specific matters generally occur during the clearance process established between them to determine which agency will investigate potential antitrust violations for which they have joint jurisdiction. According to agency officials, in recent years, the Division and USDA have worked together in a number of respects. For example:

- The Division obtains useful information from USDA's AMS and ERS.

- With respect to livestock and meatpacking markets, the Division has obtained useful information from USDA's GIPSA.[15]
- The Division has also provided technical assistance to GIPSA on various economic studies and on GIPSA's competition enforcement program.
- During the course of any major antitrust investigation involving agriculture-related markets, the Division typically consults with USDA officials to obtain the benefit of their perspective.
- USDA and Division officials have also participated in a number of interagency policy and public outreach efforts regarding competitive conditions in agriculture-related markets.

The Division, FTC, and USDA entered into a Memorandum of Understanding (MOU)[16] on August 31, 1999, that sets forth general policy for interacting, exchanging information, and continuing to work together on competitive developments in the agriculture marketplace. Division, FTC, and USDA officials described the MOU as memorializing a long-standing, cooperative working relationship between the agencies. Under the MOU, each agency agreed to designate a primary contact person to facilitate communication among agency officials. The Division's designated contact is an attorney-advisor in the Legal Policy Section. However, in practice, this responsibility is shared with the Division's Special Counsel for Agriculture.[17] FTC's contact is the Deputy Director in the Bureau of Competition; and USDA's contact is the Assistant General Counsel, Trade Practices Division. The officials in the three agencies could not determine whether there has been any change in the purpose or frequency of contact since the MOU was signed because they have not tracked, nor do they currently track, communications, coordination, or consultations between the agencies.

To avoid duplication of effort in areas of antitrust enforcement in which FTC and the Division share enforcement jurisdiction, the agencies issued

[15] A recently issued GAO report recommended changes to the Agriculture Department's method of investigating potential anticompetitive behavior under the Packers and Stockyard Act. *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices* (GAO/RCED-00-242, Sept. 21, 2000).

[16] According to agency officials, the MOU was an outgrowth of the 1998 interagency panel that examined concentration in the agriculture industry, particularly with respect to the hog market. The task force was made up of representatives of USDA, FTC, the Division, and other agencies and was coordinated through the Office of the White House Counsel.

[17] This position was created in January 2000 to report directly to the Assistant Attorney General for Antitrust and work exclusively on agriculture-related issues.

joint clearance procedures, most recently revised in December 1993, to determine which agency will pursue an investigation.[18] According to Division officials, the agencies interact on specific matters mainly around these procedures. Appendix III provides, among other things, information on the clearance procedures.

According to Division officials, the August 1999 MOU is the only formal procedure relating to the interaction between the Division and USDA. FTC has had a formal agreement with USDA since at least 1958 regarding investigations in the wholesale or retail food industry.

According to Division and USDA officials, USDA provides the Division with useful information about agricultural markets that the Division uses in its economic analysis of a particular industry. Additionally, when USDA uncovers conduct that it believes may violate antitrust laws, it has the authority to refer the matter to the Division for possible investigation and enforcement action.[19] Our review of 64 matters that the Division closed after conducting a preliminary investigation (PI) during fiscal years 1997 through 1999 revealed that 1 matter was referred from USDA. Additionally, the Division consulted with USDA on six of the matters.

[18]The first interagency agreement was informally instituted in 1938; since 1948, it has been modified and formalized.

[19]Section 202 of the Packers and Stockyards Act (P&S Act) makes unlawful actions by packers or live poultry dealers that are unfair; unjustly discriminatory or deceptive; or that are anticompetitive, such as allocation of territory or manipulating prices. Violations of section 202 by packers may be enforced through administrative litigation before the Secretary. However, according to a USDA official, violations of section 202 by live poultry dealers must be referred to the Department of Justice for enforcement. GIPSA refers those cases, cases alleging that entities have violated the Secretary's order in administrative enforcement, and cases alleging that an entity subject to the P&S Act has refused to register (as required by the P&S Act) to the U.S. Attorney's Office. According to USDA and Division officials, if GIPSA discovers evidence of anticompetitive activity that might violate the antitrust laws of the United States, USDA will communicate with Justice's Antitrust Division and cooperate with them, as appropriate, in further action on the case.

## Division Lacks Reliable Data on Complaints and Leads Received in the Agriculture Industry

Our 1991 review of the Division's criminal cases found that although the Division had a policy for documenting information on complaints and leads from the public, this policy was not always followed for complaints or leads the Division decided not to investigate.[20] As a result, the Division did not know how many complaints it had received nor did it have complete data on their characteristics. Such problems continued during the period of our review, fiscal years 1997 through 1999. High-level Division officials were not aware of a policy requiring staff to document all complaints and leads from the public, and the Division did not have a uniform database to provide divisionwide information on complaints and leads. During the course of our review, the Division took steps to improve its documentation of complaints and leads. If fully implemented, these steps should move the Division in a positive direction toward addressing the deficiencies we identified. However, the improvements do not allow the Division to track complaints and leads by industry classifications, and on the basis of past history, the information may still be collected inconsistently by the sections and field offices. Thus, better guidance and closer management attention to monitoring the documentation of complaints and leads will be necessary.

We met with high-level Division officials, including the Chief of the Legal Policy Section and an attorney-advisor in that section; the Special Counsel for Agriculture; and the attorney who, according to Division officials, handles the largest number of the complaints and leads in the agriculture industry. We asked them whether the 1980 policy cited in our 1991 report was still in effect. Initially, the officials were not aware of whether such a policy was still in effect. According to the officials, the Division could provide only an estimate of the number of complaints and leads received in the agriculture industry.

On February 29, 2000, the Division's Chief of Staff issued a memorandum to all section and field office chiefs stating that the Attorney General wanted to ensure that the Department of Justice was answering all of its mail and telephone inquiries in a timely and effective way. The memorandum required all sections and field offices to use the Division's CCTS to track inquiries from the public to help ensure that the Division was responsive to incoming inquiries. However, in June and July 2000 when we conducted our structured interviews with section and field office

[20] GAO/GGD-92-21FS, Dec. 17, 1991.

staff responsible for documenting and tracking complaints and leads, they were not all using CCTS, and two told us they had never heard of CCTS.

When the Division began implementing CCTS in 1997, the Division encouraged, but did not require, the sections and field offices to use CCTS for general and telephone correspondence.[21] CCTS was designed primarily to record information on controlled correspondence (e.g., correspondence received from the White House; Congress; and federal, state, and local agencies). CCTS includes such information as the complainant's name, address, phone number, position, and organization; the date received, date assigned, section name, staff assigned, response due date, and date completed; and a description of the complaint and keywords. CCTS does not include specific fields to capture information on SIC codes or related industries or the final outcome of complaints and leads received from the public. Additionally, CCTS is not linked to the Division's MTS. As a result, CCTS does not have the information needed to analyze patterns of potential anticompetitive behavior that might emerge from complaints and leads related to specific industries or to track the ultimate outcome of a complaint or lead.

Subsequent to our interviews with the five legal sections and seven field offices that would potentially handle complaints and leads related to the agriculture industry, Division officials determined that the July 2, 1980, directive requiring staff to document all complaints and leads was still in effect. The 1980 directive outlined the Division's policies and procedures for handling all unsolicited contacts of a routine and nonsensitive nature from the general public, whether by letter, telephone call, or personal visit. The directive required that staff

- ensure that unsolicited public contacts are assigned promptly to the appropriate staff member(s);
- log basic information about each contact;[22]

[21]According to the Division's CCTS manual, general correspondence constitutes the bulk of the Division's incoming correspondence. It comprises letters, email, or faxes addressed to the Division generally; to Division staff; or to one of the Division's sections, field offices, or units. It includes, among other things, citizen inquiries or complaints. Phone correspondence describes notes, memorandums, or logs of incoming telephone requests, especially those requiring follow-up by the Division.

[22]The 1980 directive provided examples of the types of information staff could document, such as date of receipt; complainant's name, address, and/or telephone number; type of contact; subject, staff member assigned to handle the complaint; response due date; actual response date; and other action.

- mail written responses, if warranted, within 20 working days of the date the inquiry was received by the Division;
- maintain a central file in each section and office of all correspondence and notes on telephone calls and visits; and
- make all logs and files described in the directive available for review by Division officials.

## Reported Data on Number of Complaints and Leads Received

In the absence of a central source of uniform, complete, and reliable data on complaints and leads, the Division agreed to let us contact officials in five legal sections and seven field offices to obtain any available data on complaints and leads received in those sections and field offices.[23] According to the data provided, the Division received 165 agriculture-related complaints and leads in fiscal years 1997 through 1999, 14 of which resulted in a PI being initiated (see table 1). Of these 14, 1 was referred to USDA.

Officials in these sections and field offices provided information derived from a variety of sources, such as automated and manual tracking systems and attorney notes, that varied among the sections and field offices. We did not verify the accuracy or completeness of the information provided. Officials in Transportation, Energy and Agriculture (TEA), which received the largest number of complaints and leads reported to us, indicated that the numbers for fiscal years 1997 and 1998 did not, to their knowledge, include complaints received by phone and that the 1999 data were based on information from the two section attorneys who received "most" of the complaints and leads for the section.

[23]Because the sections, task forces, and field offices employed different methods to record information about complaints and leads, we had to rely on the information officials provided during structured interviews.

**Table 1: Reported Number of Agriculture-Related Complaints and Leads Identified for Fiscal Years 1997 Through 1999 and Number of Preliminary Inquires Opened As a Result**

| | Fiscal year 1997 | | Fiscal year 1998 | | Fiscal year 1999 | | Total | |
|---|---|---|---|---|---|---|---|---|
| | Number received | Number of PIs opened | Number received | Number of PIs opened | Number received | Number of PIs opened | Number received | Number of PIs opened |
| Civil Task Force | 0 | 0 | 0 | 0 | 7 | 0 | 7 | 0 |
| Litigation I | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Litigation II[a] | 11 | 0 | 15 | 0 | 4 | 0 | 30 | 0 |
| TEA | 2 | 0 | 17 | 1 | 46 | 3 | 65 | 4 |
| Atlanta | 1 | 0 | 4 | 0 | 3 | 0 | 8 | 0 |
| Chicago | 3 | 0 | 0 | 0 | 2 | 1 | 5 | 1 |
| Cleveland | 1 | 1 | 5 | 1 | 1 | 0 | 7 | 2 |
| Dallas | 6 | 0 | 2 | 0 | 6 | 0 | 14 | 0 |
| New York | 0 | 0 | 3 | 0 | 0 | 0 | 3 | 0 |
| Philadelphia | 2 | 2 | 1 | 0 | 0 | 0 | 3 | 2 |
| San Francisco | 7 | 2 | 1 | 1 | 15 | 2 | 23 | 5 |
| **Total** | **33** | **5** | **48** | **3** | **84** | **6** | **165** | **14** |

Legend: PI = preliminary inquiry; TEA = Transportation, Energy and Agriculture.

[a]In July 1999, the Merger Task Force was combined with the Litigation II Section. The numbers reported in this table for Litigation II reflect the combined totals of both units.

Source: GAO analysis of data provided during structured telephone interviews with officials from the Antitrust Division's sections and field office.

According to Division officials, the Division receives many complaints reporting conduct that is unrelated to antitrust. In these instances, they said that a complaint might be referred to an appropriate federal, state, or local agency. For example, 4 of the 165 complaints and leads the Division received during fiscal years 1997 through 1999 were referred to FTC. On some occasions, they said the Division section may refer an antitrust-related complaint or lead to another Division section, to FTC, or to the appropriate state attorney general's office. If a Division attorney determines that there are sufficient indications of an antitrust violation to open an investigation beyond discussions with the complainant, he or she is to draft a PI request memorandum.

According to Division officials, staff can generally determine whether the information provided by a complainant merits further investigation. The Division may respond to a complainant by telephone or in writing. Division officials also said that many complaints in the agriculture industry are general in nature, with no information useful for an investigation, and that the Division's response to such a general complaint typically

- attempts to educate the complainant on antitrust laws and the Division's role in enforcing them,
- describes the type of evidence needed to open an investigation or bring a case, and
- invites the complainant to come back to the Division with more specific information that might indicate a possible antitrust violation.

On October 24, 2000, the Division rescinded the 1980 policy and issued a new directive requiring all of its sections and offices to (1) use the Division's CCTS to document and track all unsolicited public contacts (such as complaints and leads) and (2) maintain a central file of these contacts. This directive made section and field office chiefs responsible for ensuring that the procedures are routinely followed. The October 2000 directive was replaced with a November 27, 2000, directive. The only difference between the two directives was that the November directive made reference to an optional word perfect form that staff could use—in addition to CCTS, not in lieu of it—to document information for the section's or office's own central file. Consistent with the 1980 directive, neither the October 24, 2000, directive nor the November 27, 2000, directive provided guidance on the information that staff are required to document on each contact. Consequently, it is not clear that the latest directive will resolve the data availability issues discussed above, including inconsistently recorded information on complaints and leads.

## Division Also Lacks Reliable Data on Closed Matters

To obtain information on the number and type of closed matters in the agriculture industry for fiscal years 1997 thorough 1999, we relied on data from the Division's MTS, its primary management information system for tracking the Division's matters.[24] We encountered several problems with the MTS data, including inconsistencies on matter status and type. For example, there were many matters for which the final disposition was unclear according to our review of the MTS data. For some of the matters we reviewed, the MTS data indicated that actions had been taken on matters after the matters had been recorded as closed. In addition, the dispositions for some of the matters were not appropriate for the particular phase of the matters. We worked with Division officials to resolve these issues wherever possible. Recognizing its limitations, we

[24]Implemented in February 1998, MTS was created and is maintained to permit Division personnel to, among other things, locate matters currently or formerly under investigation. The system is also used in the preparation of management and budget reports.

believe the adjusted MTS data we used can provide a general profile of agriculture-related matters closed by the Division during fiscal years 1997-1999. We used the MTS data because there is no other comprehensive listing of the Division's matters and their status.

According to Division officials, there were several causes for the MTS data problems we encountered. Some of the matters we reviewed were entered into the Division's older system, the Antitrust Management Information System (AMIS), and were incorporated into MTS without change.[25] A 1991 GAO report reported that there were inaccuracies and inconsistencies in the AMIS data.[26] Concerning the matters for which MTS incorrectly indicated that the matter was closed following the PI, Division officials said it is possible to have further action after a matter is closed. Occasionally, evidence associated with a particular investigation would initially prove inadequate for further prosecutorial action. However, several months or years later, evidence may become available, and instead of opening a new PI, the Division would reopen the original investigation. We did not test the MTS data to determine the full nature or extent of the data reliability problems. However, with the corrections made with the assistance of Division officials, the MTS data we used can provide a general profile of the status of agriculture-related matters closed by the Division in fiscal years 1997 through 1999.

## Most Closed Matters Involved Hart-Scott-Rodino Filings and Were Not Pursued

MTS data showed that the Division closed 1,050 matters involving mergers and potential antitrust violations in the agricultural industry during fiscal years 1997 through 1999. Of these 1,050 matters, 935 (89 percent) were Hart-Scott-Rodino merger filings. Of these 935 filings, 827 (88 percent) expired within the initial 30-day HSR waiting period. The Division took no formal action, such as opening a PI, beyond reviewing the documents submitted by the merging parties and public sources of information for these 827 matters—a normal outcome for mergers that are permitted to proceed after the required premerger notification period. Table 2 shows the classification of the 1,050 matters closed by the Division during this time period.

[25]For reopened matters, the dispositions captured in MTS at the time we reviewed the data may be subsequently changed, so that the final dispositions, if matters were reopened, may be different from those we have reported in this report.

[26]GAO/GGD-92-21FS, Dec. 17, 1991.

**Table 2: Classification of Agriculture-Related Matters Closed by the Antitrust Division, Fiscal Years 1997 through 1999**

| Classification | FY 97 | FY 98 | FY 99 | Total |
|---|---|---|---|---|
| Hart-Scott-Rodino mergers | 262 | 326 | 347 | **935** |
| Civil nonmergers | 19 | 6 | 10 | **35** |
| Criminal | 10 | 3 | 18 | **31** |
| Pre-Hart-Scott-Rodino mergers[a] | 6 | 7 | 13 | **26** |
| Multiple types | 4 | 4 | 5 | **13** |
| Non-Hart-Scott-Rodino mergers[b] | 2 | 1 | 2 | **5** |
| Other[c] | 1 | 4 | 0 | **5** |
| **Total** | **304** | **351** | **395** | **1,050** |

[a]A "pre-Hart-Scott-Rodino merger" is a merger subject to HSR reporting but for which the PI memo was submitted before the HSR filing was received.

[b]A "non-Hart-Scott-Rodino merger" is a merger not subject to HSR reporting.

[c]Other includes business reviews, judgment enforcement, and requests for export trade certificates.

Source: GAO analysis of data from the Division's MTS database.

As discussed previously, the Division included several SIC codes in its definition of the agricultural industry. The largest number of the 1,050 matters closed by the Division during the 3 fiscal years was in SIC codes for food manufacturing—442, or 42 percent. Table 3 shows the number of matters that were closed by the Division during fiscal years 1997 through 1999 by the agriculture-related SIC categories that make up the Division's definition for the agricultural industry.

**Table 3: Number of Agriculture-Related Matters Closed by the Antitrust Division by SIC Category, Fiscal Years 1997 through 1999**

| | Fiscal year | | | |
|---|---|---|---|---|
| | **1997** | **1998** | **1999** | **Total** |
| All food manufacturing | 124 | 162 | 156 | **442** |
| Eating and drinking places | 50 | 37 | 45 | **132** |
| Retail food stores | 26 | 38 | 67 | **131** |
| Wholesale trade–groceries | 36 | 42 | 52 | **130** |
| Wholesale trade–farm supplies | 8 | 6 | 13 | **27** |
| Agricultural chemicals | 7 | 8 | 7 | **22** |
| Farm machinery manufacturing | 3 | 9 | 7 | **19** |
| Wholesale trade–beer, wine, and distilled beverages | 7 | 6 | 6 | **19** |
| All crop production | 4 | 8 | 5 | **17** |
| All tobacco products | 5 | 2 | 7 | **14** |
| Wholesale trade–farm/raw materials | 10 | 1 | 3 | **14** |
| All livestock production | 0 | 7 | 3 | **10** |
| Warehousing and storage | 1 | 4 | 4 | **9** |
| All agricultural services | 3 | 1 | 1 | **5** |
| Food products machinery manufacturing | 3 | 0 | 3 | **6** |
| Wholesale trade–farm and garden machinery | 2 | 0 | 2 | **4** |
| Wholesale trade–tobacco products | 0 | 0 | 1 | **1** |
| Multiple primary codes | 2 | 0 | 3 | **5** |
| Other[a] | 13 | 20 | 10 | **43** |
| **Total** | **304** | **351** | **395** | **1,050** |

[a]Other includes those matters for which the primary SIC code was not agriculture, but there were secondary SIC codes that were.

Note: See appendix I for definitions of the SIC categories used in this table.

Source: GAO analysis of data from the Division's MTS database.

It should be noted that FTC also handles matters in the agriculture industry, so the figures above do not include the entire universe of agriculture antitrust matters and merger filings within these SIC codes. The Division could not provide reliable data on the direct labor costs for agriculture-related matters that were closed during fiscal years 1997 through 1999. According to Division officials, MTS does not contain reliable data on direct labor costs, although such data could be obtained with some effort from other sources.

## Phases of Closed Matters

Not all of the matters handled by the Division culminated in a case being filed in civil or criminal court. We analyzed the Division's MTS database to ascertain how many matters completed the various phases of an inquiry or what the last actions taken were when no inquiry was done. As previously noted, the majority of the 1,050 matters closed by the Division during this period were filings submitted under the premerger notification provisions of the HSR Act. In about 88 percent of these filings, the Division did not initiate any formal investigative inquiries because it concluded that the matters did not appear to raise significant competitive concerns warranting a more thorough review. These matters were closed without further action on or before the expiration of the initial 30-day HSR waiting period expired. Table 4 shows the number of matters closed by the Division by the last phase of inquiry or action taken in the matter. The categories are listed in the general order of resources expended on the matter. For example, HSR filings that expired within the initial 30-day waiting period or that were cleared to FTC would not generally result in a preliminary inquiry. Conversely, a civil investigative demand (CID) would generally be issued following a preliminary inquiry.

**Table 4: Last Phase of Inquiry at Which the Division Closed Agriculture-Related Matters, Fiscal Years 1997 Through 1999**

| | Fiscal year | | | |
|---|---|---|---|---|
| | **1997** | **1998** | **1999** | **Total** |
| HSR filings that expired within 30-day waiting period | 228 | 284 | 315 | **827** |
| HSR filings that were cleared to FTC | 20 | 18 | 18 | **56** |
| Non-HSR matters cleared to Justice for which a PI was not initiated | 17 | 7 | 1 | **25** |
| Non-HSR matters that were cleared to FTC | 14 | 9 | 18 | **41** |
| Preliminary inquiry only | 13 | 26 | 25 | **64** |
| CID[a] issued or grand jury held | 6 | 4 | 10 | **20** |
| Civil or criminal case filed in court | 5 | 3 | 8 | **16** |
| Business review conducted[b] | 1 | 0 | 0 | **1** |
| **Total** | **304** | **351** | **395** | **1,050** |

[a]A CID may be issued to any person who may be in possession, custody, or control of documentary material, or may have any information, relevant to a civil antitrust investigation. A CID is a written demand for such person to produce such documentary material for inspection and copying, to answer in writing written interrogatories, to give oral testimony concerning documentary material, or to furnish any combination of such material, answers, or testimony.

[b]According to the Division manual, under the Antitrust Division's Business Review Procedure, 28 C.F.R., § 50.6, business entities can ascertain the Division's current enforcement intentions with respect to proposed business conduct. The business review procedure is currently used to evaluate only potential civil, nonmerger conduct, with the exception of a very limited number of health care mergers.

Source: GAO analysis of data from the Division's MTS database.

To determine any differences among various agriculture-related industries, we arrayed the inquiry phases in table 4 by primary SIC category. Table 5 shows the last phase of each matter by the primary SIC category for all 3 fiscal years. In appendix IV, we also summarize information about the 64 matters shown in table 4 that were closed following a PI with no further action.

**Table 5: SIC Categories for Different Phases of Agriculture-Related Matters Closed by the Division During Fiscal Years 1997 Through 1999**

| | Category | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | HSR- DOJ | HSR – FTC | Non-HSR – DOJ | Non-HSR - FTC | PI | CID or Grand Jury | Civil or crim. case | Bus. Review | Total |
| All food manufacturing | 340 | 20 | 11 | 8 | 41 | 14 | 8 | 0 | **442** |
| Eating and drinking places | 129 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | **132** |
| Retail food stores | 95 | 13 | 2 | 19 | 2 | 0 | 0 | 0 | **131** |
| Wholesale trade–groceries | 116 | 4 | 2 | 1 | 5 | 1 | 1 | 0 | **130** |
| Wholesale trade–farm supplies | 22 | 0 | 1 | 0 | 2 | 1 | 1 | 0 | **27** |
| Agricultural chemicals | 12 | 6 | 0 | 3 | 0 | 0 | 1 | 0 | **22** |
| Farm machinery manufacturing | 17 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | **20** |
| Wholesale trade–beer, wine, and distilled beverages | 14 | 1 | 3 | 0 | 1 | 0 | 0 | 0 | **19** |
| All crop production | 9 | 1 | 2 | 1 | 2 | 2 | 0 | 0 | **17** |
| Tobacco manufacturing | 10 | 1 | 0 | 3 | 0 | 0 | 0 | 0 | **14** |
| Wholesale trade–farm/raw materials | 6 | 1 | 2 | 0 | 2 | 0 | 3 | 0 | **14** |
| All livestock production | 9 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | **10** |
| Warehousing and storage | 9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **9** |
| All agricultural services | 4 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | **5** |
| Food machinery manufacturing | 2 | 0 | 1 | 1 | 1 | 0 | 0 | 0 | **5** |
| Wholesale trade–farm and garden machinery | 2 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | **4** |
| Wholesale trade–tobacco products | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **1** |
| Multiple primary codes | 0 | 3 | 0 | 0 | 2 | 0 | 0 | 0 | **5** |
| Other[a] | 30 | 2 | 1 | 4 | 2 | 2 | 1 | 1 | **43** |
| **Total** | **827** | **56** | **25** | **41** | **64** | **20** | **16** | **1** | **1,050** |

[a]Other are those matters for which the secondary code(s), but not the primary code(s), was included in the definition of agricultural industry.

Source: GAO analysis of data from the Division's MTS database.

Upon reviewing these tables, the Division questioned the category "Non-HSR matters cleared to Justice for which a PI was not initiated" in table 4. We provided the Division with a list of the matters that we placed in that category as a result of our analysis of the MTS database. After additional

research of the files and discussions with the attorneys who handled some of these matters, the Division provided additional information on all 25 of the matters in that category.

According to Division officials, of these 25 matters, the last action or phase for 4 was PI, CID or grand jury for 5, and a case filed in court for 3. The officials indicated that the Division initiated a PI memorandum but that a PI was not conducted for one matter; and the Division had considered opening a PI for another, but then decided not to after gathering additional information about the matter. They indicated that the remaining 11 matters involved Division activities that do not require that a PI be opened—5 involved the Division's responsibilities for granting an export trade certificate, 2 involved judgment enforcement actions, 2 involved judgment modification actions, 1 was a business review letter, and 1 was an internal matter—one field office reviewing another office's files for ideas on how to approach a possible investigation.

According to Division officials, the 12 matters for which a PI had been opened, a CID issued, a grand jury convened, or a case filed in court should all have been linked in MTS to other matters in the database. They said that the links apparently had not been made in the database and believed that including these matters in our profile would, therefore, be double-counting. As previously noted, we based our profile on the information that was available in the MTS database. Although we understand the Division's concern about double-counting, we have not dropped these matters from our analysis for mainly two reasons. First, we do not know whether there were additional cases for which the MTS database was missing appropriate links. It is possible that additional case file review and analysis would have resulted in alterations to the MTS data for other matters. Second, removing these 25 matters from our profile would afford them preferential treatment based on detailed Division research and analyses that were not conducted for all agriculture-related matters in the database. Moreover, the fact that the Division had to conduct additional review on these matters to clarify their status further illustrates that the information in the database is not wholly reliable. Given the problems we encountered with the database throughout this assignment, we believe that the data available from MTS cannot be used without the type of time-consuming checking and scrutiny that the Division and we performed. An accurate, detailed picture of the Division's workload cannot readily be determined using MTS alone until the Division corrects the errors that have been identified and verifies that all of the data in MTS are accurate and reliable.

## Conclusions

Although the Division had a specific policy to document all complaints and leads received, the policy was not consistently followed in the past by all sections and field offices. Federal internal control standards, among other things, note that all transactions and significant events should be clearly documented and promptly recorded to maintain their relevance and value to management in controlling operations and making decisions.[27] The Division's new policy requiring staff to document all complaints and leads in CCTS is a step in the right direction. However, given our 1991 finding that the 1980 policy was not being followed by all sections and field offices and given the findings of our current review, we believe that better guidance and closer management attention will be needed to ensure compliance with whatever policy is in place.

However, even if the new policy is implemented consistently, the CCTS system is inadequate for providing the information needed to assess patterns in complaints and leads by industry or track and analyze the results of complaints and leads. CCTS does not include specific fields for SIC code or the final outcome of complaints and leads received from the public. Furthermore, the Division's primary management information system for tracking matters, MTS, does not include information on the source of a matter, nor is it linked to CCTS. As a result, Division officials may not have readily available information on the source of matters and the specific industries about which the Division is receiving complaints.

The data in the Division's MTS, which are used for developing management and budget reports, are not totally accurate and reliable. Errors have been identified that have not been corrected. For example, links were not consistently established between related matters, and actions were recorded after matters had reportedly been closed. Given the problems we encountered with the MTS database throughout this assignment, we believe that MTS information should be used with caution and that an accurate, detailed picture of the Division's workload cannot

[27] *Standards for Internal Control in the Federal Government* (GAO/AIMD-00-21.3.1, Nov. 1999).

readily be determined until the Division corrects the errors that have been identified and verifies that all MTS data are accurate and reliable.

## Recommendations

To ensure that (1) all complaints and leads are documented as required by the Division policy; (2) data are readily available on the final outcome of complaints and leads, the source of matters, referrals of matters to other agencies, and the specific industries in which the Division receives complaints and leads; and (3) the Division has an accurate and reliable database that can be used to prepare meaningful management and budget reports, we recommend that the Attorney General direct the Assistant Attorney General for Antitrust to

- modify CCTS to capture the related SIC code(s);
- monitor compliance with the November 27, 2000, policy regarding documenting and tracking public inquiries;
- link CCTS to MTS to provide a mechanism to determine the source of the matter and the ultimate outcome of a complaint; and
- correct the errors that have been identified in MTS as a result of our work and verify that the MTS data are accurate and reliable.

## Agency Comments

Justice's Antitrust Division provided written comments on a draft of this report. In its comments, which are included as appendix V, the Division stated that our recommendation to incorporate a data field for SIC codes into CCTS was reasonable and that it would also consider our recommendation to link CCTS to MTS to enable the Division to track the results of citizens' complaints. The Division was silent on our recommendation that it monitor compliance with the November 27, 2000, policy regarding documenting and tracking public inquiries.

The Division took issue with our recommendation to correct errors and improve the accuracy and reliability of MTS data. The Division stated that although data linkages can be improved and data coding reviewed to ensure consistency, MTS is soundly structured, logically presented, and contains fully reliable data. The Division contended that we based our conclusion concerning the reliability of MTS data largely on the results of 25 of 1,050 agriculture-related matters.

We continue to believe that the Division needs to take steps to improve the accuracy and reliability of MTS data. Contrary to the Division's assertions, the basis for our conclusion goes beyond the 25 matters highlighted in the report. On numerous occasions during our review, we had to ask officials

for clarification about data issues because the information as presented was not clear or appeared to be in error. For example, there were many matters for which we could not determine the final disposition on the basis of the data recorded. Division officials needed to devote considerable time and effort to respond to questions and issues we raised. MTS data should not require repeated reviews and refinements to produce accurate data on simple frequency counts of the number of matters closed. The finding of missing database links for 12 of the 25 matters further illustrates the difficulty of creating accurate frequency counts using the MTS database without careful and time-consuming review of the data, sometimes requiring a review of the case files. The Division acknowledged in its letter that it is currently reviewing how best to ensure that any similar linkage issues are identified and corrected, and it is updating MTS as new information becomes available and inaccuracies or gaps are discovered. These statements show that the Division recognizes that information in the MTS database needs improvement.

In connection with its discussion on data reliability problems, the Division mistakenly stated that we found that its reopening of previously closed matters was an indication of incorrect closures. We recognize that closed matters are sometimes reopened in light of new evidence and do not object to the Division doing so. Our point was that the database does not accurately portray this activity, and we noted this as another example of MTS failing to accurately represent Division activity. However, we modified the language in our report to clarify this issue.

The Division also commented on four other items discussed in our report. First, the Division stated that contrary to our assertion, it could report direct labor costs for matters but not from one central data source. During our review a high-level Division official stated that although it is true that MTS does not contain accurate data on direct labor costs for specific matters, such data would be available through various other sources. However, at a meeting to discuss direct labor costs, among other things, this official told us that although the Division could provide us with these data with considerable effort, the data would be incomplete and lack credibility.

Second, the Division indicated that its efforts to improve its documentation of complaints and leads began well before we initiated our review. However, the Division's response ignores the fact that the problems we identified in tracking complaints and leads were also identified in our 1991 report. Thus, any corrective actions taken over the last 10 years were insufficient to address the deficiencies identified in that

report. As noted in our report, at the beginning of our review Division officials were unsure whether the 1980 policy to document and track complaints and leads was still in effect. Further, at the beginning of our review the Division's sections and offices were not using a uniform system to document and track complaints and leads. The Division issued a memorandum in February 2000 that instructed the legal sections and field offices to use CCTS to track all public inquiries and ensure that they were addressed in a timely manner. In June 2000, we found that 7 out of the 12 sections and field offices were not using CCTS to document and track complaints and leads. Of the five that were using CCTS, three had begun using it only after March 2000. In October 2000, the Division issued a directive requiring all sections and field offices to (1) use the CCTS to document and track all unsolicited pubic contacts and (2) maintain a central file of these contacts.

Third, the Division stated that the draft report gave the impression that if a merger filing under the HSR process did not result in a PI being opened, the Division had taken no action. It was not our intent to give this impression. Our report states that the Division took no formal action in these filings. Further, our report states that it is a normal outcome that PIs are not initiated for the majority of HSR mergers and that such mergers are permitted to proceed at the end of the required waiting period after the Division has concluded that they should be permitted to proceed. However, we modified the language in our report to clarify this issue.

Fourth, the Division commented on the definition of "agriculture" used to determine which matters to include in our review, intimating perhaps that this was a shortcoming of the Division. We did not take issue with the Division's lack of a working definition of agriculture. We merely stated that because there was no set definition, we needed to determine one to define the constraints of our review. Furthermore, we relied on the Division's judgment in this matter and accepted its definition as given. In fact, the definition the Division provided was the same one that it used in its April 2000 response to Senator Lugar on another agriculture-related antitrust matter.

The Division also offered technical comments on the draft, which we incorporated where appropriate. However, we disagree with the Division's characterization of our description of the antitrust legal framework and antitrust enforcement, as the vast majority of its comments were technical suggestions or editorial preferences and not substantive. Moreover, in some cases, the Division's suggested changes altered wording taken directly from the Division's written policies and

procedures. In such cases, we generally retained the wording from the Division's official documentation.

We also requested comments from FTC and USDA officials with whom we had met during this review. Both agencies provided technical comments, which we incorporated where appropriate.

We will send copies of this report to Senator Orrin G. Hatch, Chairman, and Senator Patrick J. Leahy, Ranking Member, Senate Committee on the Judiciary; Representative Jim Sensenbrenner, Jr., Chairman, and Representative John Conyers, Jr., Ranking Minority Member, House Committee on the Judiciary; the Honorable John D. Ashcroft, Attorney General; the Honorable Mitchell E. Daniels, Jr., Director of Management and Budget; and other interested parties. We will also make copies available to others upon request. This report will also be available on GAO's home page at http:/www.gao.gov.

Please contact William Jenkins or me on (202) 512-8777 if you or your staff have questions about this report. Major contributors to this report are acknowledged in appendix VI.

Richard M. Stana
Director, Justice Issues

# Appendix I: Objectives, Scope and Methodology

Our objectives were to (1) describe the Department of Justice's Antitrust Division's (Division) interaction with the Federal Trade Commission (FTC) and the U.S. Department of Agriculture (USDA) with regard to antitrust matters in the agriculture industry, (2) provide information on the number of complaints and leads in the agriculture industry received by the Division for fiscal years 1997 through 1999, and (3) provide information on the number and type of closed matters in the agriculture industry for fiscal years 1997 through 1999.

Because the Antitrust Division does not have a working definition of the agriculture industry, we first had to determine what constituted the agriculture industry. To define what complaints, leads, matters, and cases were related to agriculture, we met with the Division and requestor staff to identify the Standard Industrial Classification (SIC) codes that would encompass agriculture. The Division assigns each matter or case one or more SIC codes. As agreed with Senator Grassley's office, we used the Division's selected SIC codes to define the agriculture-related activities. The Division's selected SIC codes used to define the agriculture industry included those specifically related to plant and animal products that originate on land and are commercially cultivated or raised for human or animal consumption, meaning oral ingestion. If any identified complaint, lead, matter, or case included one of these SIC codes, we included it in our analysis. The SIC codes the Division included in its definition for the agricultural industry, as well as the way we grouped them for analysis purposes, are shown in table 6.

**Table 6: SIC Codes Included in the Definition of the Agriculture Industry.**

| GAO Categorization | SIC Code[a] | Definition |
|---|---|---|
| All crop production | 01 | All crop production, including tobacco and cotton (because of cottonseed oil), with the sole exception of ornamental nursery products (Code 0181) |
| All livestock production | 02 | All livestock, including animal aquaculture (Code 0273), except for fur-bearing animals and rabbits (Code 0271), horses and other equines (Code 0272), and animal specialties not elsewhere classified (Code 0279 - pets, lab animals, etc) |
| All agricultural services | 07 | All agricultural services, including cotton ginning (Code 0724 – a necessary step in producing cottonseed oil), except for specialized veterinary services (Code 0742 – pets, horses, fur-bearers), and landscape and horticultural services (Code 078 – lawnscapes, lawn and garden, ornamental shrubs and trees) |
| All food manufacturing | 20 | All food manufacturing, except canned and cured seafood (Code 2091), fresh or frozen prepared fish (Code 2092), and manufactured ice (Code 2097) |
| Tobacco manufacturing | 21 | All tobacco products manufacture |
| Agricultural chemicals | 287 | Agricultural chemicals manufacture |
| Farm machinery manufacturing | 3523 | Farm machinery and equipment manufacture |
| Food machinery manufacturing | 3556 | Food products machinery manufacture |
| Warehousing and storage | 4221 | Farm product warehousing and storage |
| | 4222 | Refrigerated warehousing and storage |
| Wholesale trade–farm and garden machinery | 5083 | Wholesale trade in farm and garden machinery |
| Wholesale trade–groceries | 514 | Wholesale trade in groceries and related products, except for trade related solely to fish and seafood (Code 5146) |
| Wholesale trade–farm/raw materials | 515 | Wholesale trade in farm product raw materials |
| Wholesale trade–beer, wine, and distilled beverages | 518 | Wholesale trade in beer, wine, and distilled beverages |
| Wholesale trade–farm supplies | 5191 | Wholesale trade in farm supplies |
| Wholesale trade–tobacco products | 5194 | Wholesale trade in tobacco and tobacco products |
| Retail food stores | 54 | Retail food stores |
| Eating and drinking places | 58 | Eating and drinking places |
| Liquor stores | 592 | Liquor stores |
| Tobacco stores and stands | 5993 | Tobacco stores and stands |

[a]Two-digit SIC codes designate each major industry group. The scheme is hierarchical and allows related industries to be classified together. Each additional digit provides an increasing level of specificity in designating the industry group.

To obtain information on the Division's interaction with the FTC and USDA, in each of the three agencies, we relied primarily on interviews with key officials in the Division, FTC, and USDA. We relied on these officials' representation of the agencies' interaction. We also reviewed the Division's policies and procedures for interacting with other agencies and relevant interagency agreements, including the 1999 Memorandum of

Understanding that addresses cooperation among the Division, FTC, and USDA for monitoring competitive conditions in the agricultural marketplace. In addition, we reviewed Division testimonies, speeches, and press statements that addressed the interaction among the agencies. With regard to merger investigations, we reviewed agreements between the Division and FTC for cases that fell within the joint antitrust jurisdiction of both agencies. These included a 1993 agreement that established clearance procedures for investigations and a 1995 agreement in which the agencies agreed to specific time frames for deciding which agency should investigate a matter.

Because the Division had not collected consistent, divisionwide information on complaints and leads, we relied on data provided by Division officials to obtain information about the agriculture-related complaints and leads the Division received by mail, telephone, facsimile, e-mail, or personal visit during fiscal years 1997 through 1999. To obtain information on the policies and procedures for documenting and tracking complaints and leads, we interviewed the Director of Legal Policy; the Chief of the Legislative Unit; the Executive Officer; the Special Counsel for Agriculture; and the Directors of Criminal Enforcement, Civil Merger Enforcement, and Civil Nonmerger Enforcement. In addition, we reviewed the Division's directives for tracking complaints and leads. We also held structured interviews with Division officials representing the five headquarters sections or task forces—Civil Task Force; Litigation I section; Litigation II section; Transportation, Energy and Agriculture section, and Merger Task Force[1]—and the seven field offices—Atlanta, Chicago, Cleveland, Dallas, New York, Philadelphia, and San Francisco—that Division officials said would most likely have reviewed anticompetitive matters in the agriculture industry for the period we reviewed. We asked them to describe their policies and procedures for documenting and tracking complaints and leads. We provided them with the agriculture-related SIC codes, and we asked them to provide us with data on, among other things, the total number of agriculture-related complaints and leads received by SIC code for each fiscal year 1997 through 1999 and the outcome of the complaint or lead. Because of the variety of methods used to track complaints and leads within the Division, we could not verify the accuracy or completeness of the data provided to us.

[1]In July 1999, the Merger Task Force was combined with the Litigation II Section.

To summarize and describe the matters that were closed during fiscal year 1997 through 1999, we analyzed data from the Division's Matter Tracking System (MTS). MTS contains information on all civil merger, civil nonmerger, and criminal matters handled by the Division. As each matter goes through various phases in the enforcement process, MTS is to capture each phase and its related disposition. MTS is designed and used primarily for Division management purposes.

We obtained data on the characteristics of the matters for those agriculture-related SIC codes for fiscal years 1997 through 1999. To understand the data elements in MTS and how the Division systematically maintains information on matters during its review of potential anticompetitive conduct, we reviewed the *Antitrust Division Manual* and the Division's MTS data dictionary, and we met with officials from the Division's Information Systems Support Group.

We defined a closed matter as any effort (e.g., a case, an investigation, an inquiry, etc.) in the database that the Division closed during fiscal years 1997, 1998, or 1999. The database defines matters by use of a unique identification number, which tracks efforts that may span multiple years and/or contain multiple phases. We used this number to identify each individual matter.

To provide a profile, we categorized the closed matters in the agriculture industry into the following groups:

1. Hart-Scott-Rodino (HSR) matters that expired by the 30-day limit (under Division purview),
2. HSR matters that were cleared to FTC,
3. non-HSR matters on which a formal PI was not opened (under Division purview),
4. non-HSR matters that were cleared to FTC,
5. matters in which a PI was opened but no further action was taken by the Division,
6. matters on which a civil investigation was conducted or a grand jury was held,
7. matters for which a civil or criminal case was filed in court, or

8. business review matters.

The groups were defined on the basis of the last phase recorded in the database for the matter. A matter in group (7), for example, might have originated as an HSR filing; but it was assigned to group (7) because the last phase recorded either indicated that a case was filed, or it gave the outcome (e.g., "won") of the case.

To augment MTS information for our profile of closed matters, we reviewed Antitrust Division memorandums for matters for which a PI was conducted but no further actions were taken by the Division. Our data collection instrument included the dates that the investigation was authorized to be opened and closed, the type of matter, statute and potential antitrust conduct violated, geographic market, amount of commerce affected, SIC code(s), section assigned to review the matter, reason for closing the investigation, and whether or not there was economic analysis group concurrence.

For those matters for which we were unable to understand the information provided in the memoranda, we spoke with a Division official to clarify the information. We verified summary results with Antitrust Division officials, and we discussed and came to agreement on matters of discrepancy.

# Appendix II: Overview of the Department of Justice's Antitrust Division Staffing and Functions

The Department of Justice's Antitrust Division's (Division) mission is to promote and maintain competition in the American economy. According to its manual, the Division's primary functions and goals include

- the general criminal and civil enforcement of the federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization;
- the intervention or participation before administrative agencies functioning wholly, or partly, under the regulatory statutes in proceedings requiring consideration of the antitrust laws or competitive policies; and
- the advocacy of procompetitive policies before other branches of government.

To accomplish its mission, the Division has 16 sections or task forces in headquarters and 7 field offices located throughout the United States. As shown in table 7, as of July 21, 2000, the Division had 561 full-time staff and 237 part-time staff, of which about 29 percent of the full-time staff and about 21 percent of the part-time staff were assigned to the field offices.

**Table 7: Antitrust Division's Section and Field Office Staffing, as of July 21, 2000**

| | Attorney | | Economists | | Paralegals | | Secretaries | | Other | | Total | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Headquarters section | Full-time | Part-time | Full-time | Part-time | Full-time | Part-time | Full-time | Part-time | Full-time | Part-time | Full-time | Part-time |
| Office of AAG | 14 | 2 | 0 | 0 | 0 | 1 | 4 | 0 | 5 | 0 | 23 | 3 |
| Office of Operations | 7 | 1 | 0 | 0 | 0 | 3 | 2 | 2 | 2 | 0 | 11 | 6 |
| FOIA and Privacy Act Unit | 1 | 0 | 0 | 0 | 4 | 1 | 0 | 1 | 2 | 1 | 7 | 3 |
| Paralegal Unit | 0 | 0 | 0 | 0 | 16 | 71 | 0 | 7 | 0 | 1 | 16 | 79 |
| Appellate Section | 10 | 1 | 0 | 0 | 0 | 0 | 2 | 0 | 1 | 0 | 13 | 1 |
| Civil Task Force | 19 | 4 | 0 | 0 | 0 | 4 | 4 | 4 | 0 | 0 | 23 | 12 |
| Competition Policy Section | 0 | 0 | 18 | 0 | 0 | 0 | 1 | 0 | 0 | 2 | 19 | 2 |
| Computers and Finance Section | 24 | 1 | 0 | 0 | 0 | 2 | 4 | 1 | 1 | 1 | 29 | 5 |
| Economic Litigation Section | 0 | 0 | 15 | 3 | 0 | 1 | 3 | 1 | 7 | 2 | 25 | 7 |
| Economic Regulatory Section | 0 | 0 | 19 | 0 | 0 | 0 | 2 | 3 | 0 | 3 | 21 | 6 |
| Executive Office | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 22 | 9 | 23 | 10 |
| Information Systems Support Group | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 20 | 1 | 20 | 3 |
| Foreign Commerce Section | 7 | 1 | 0 | 0 | 0 | 0 | 0 | 2 | 1 | 0 | 8 | 3 |
| Legal Policy Section | 5 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 7 | 2 |

| | Attorney | | Economists | | Paralegals | | Secretaries | | Other | | Total | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Headquarters section** | **Full-time** | **Part-time** | **Full-time** | **Part-time** | **Full-time** | **Part-time** | **Full-time** | **Part-time** | **Full-time** | **Part-time** | **Full-time** | **Part-time** |
| Litigation I Section | 15 | 1 | 0 | 0 | 0 | 1 | 2 | 1 | 2 | 0 | 19 | 3 |
| Litigation II Section | 47 | 5 | 1 | 0 | 0 | 4 | 5 | 8 | 2 | 0 | 55 | 17 |
| Telecommunications Task Force | 25 | 5 | 0 | 0 | 0 | 3 | 4 | 3 | 1 | 0 | 30 | 11 |
| Transportation, Energy and Agriculture Section | 25 | 3 | 0 | 0 | 0 | 3 | 6 | 2 | 1 | 0 | 32 | 8 |
| Health Care Task Force | 12 | 2 | 0 | 0 | 0 | 1 | 3 | 2 | 1 | 0 | 16 | 7 |
| **Totals** | **211** | **28** | **53** | **3** | **20** | **97** | **44** | **40** | **69** | **20** | **397** | **188** |
| **Percent of division totals** | **38** | **12** | **9** | **1** | **4** | **41** | **8** | **17** | **12** | **8** | **71** | **79** |
| **Field offices** | | | | | | | | | | | | |
| Atlanta | 12 | 1 | 0 | 0 | 5 | 4 | 2 | 2 | 2 | 0 | 21 | 7 |
| Chicago | 11 | 0 | 1 | 0 | 2 | 5 | 5 | 1 | 3 | 0 | 22 | 6 |
| Cleveland | 13 | 1 | 0 | 0 | 2 | 3 | 2 | 2 | 3 | 0 | 20 | 6 |
| Dallas | 13 | 0 | 0 | 0 | 3 | 5 | 4 | 1 | 3 | 0 | 23 | 6 |
| New York | 17 | 1 | 0 | 0 | 3 | 4 | 4 | 2 | 4 | 0 | 28 | 7 |
| Philadelphia | 14 | 2 | 0 | 0 | 1 | 7 | 4 | 2 | 2 | 0 | 21 | 11 |
| San Francisco | 16 | 1 | 1 | 0 | 3 | 2 | 4 | 2 | 5 | 1 | 29 | 6 |
| **Totals** | **96** | **6** | **2** | **0** | **19** | **30** | **25** | **12** | **22** | **1** | **164** | **49** |
| **Percent of division totals** | **17** | **3** | **.4** | **0** | **3** | **13** | **4** | **5** | **4** | **.4** | **29** | **21** |
| **Division totals** | **307** | **34** | **55** | **3** | **39** | **127** | **69** | **52** | **91** | **21** | **561** | **237** |

Note: Percentages do not add to 100 due to rounding.

Source: Antitrust Division staffing summary as of July 21, 2000.

The Assistant Attorney General (AAG) for the Antitrust Division is responsible for leadership and oversight of all Division programs and policies. The Division AAG is nominated by the president and confirmed by the Senate. The AAG's Chief of Staff is responsible for managing the Office of the Assistant Attorney General, advising the AAG on the formulation and implementation of highly sensitive antitrust policy issues, and coordinating that policy with other federal and state government agencies.

As of November 2000, the Division AAG had has three special counsels—the Special Counsel for Civil Enforcement, the Special Counsel for Information Technology, and the Special Counsel for Agriculture (who

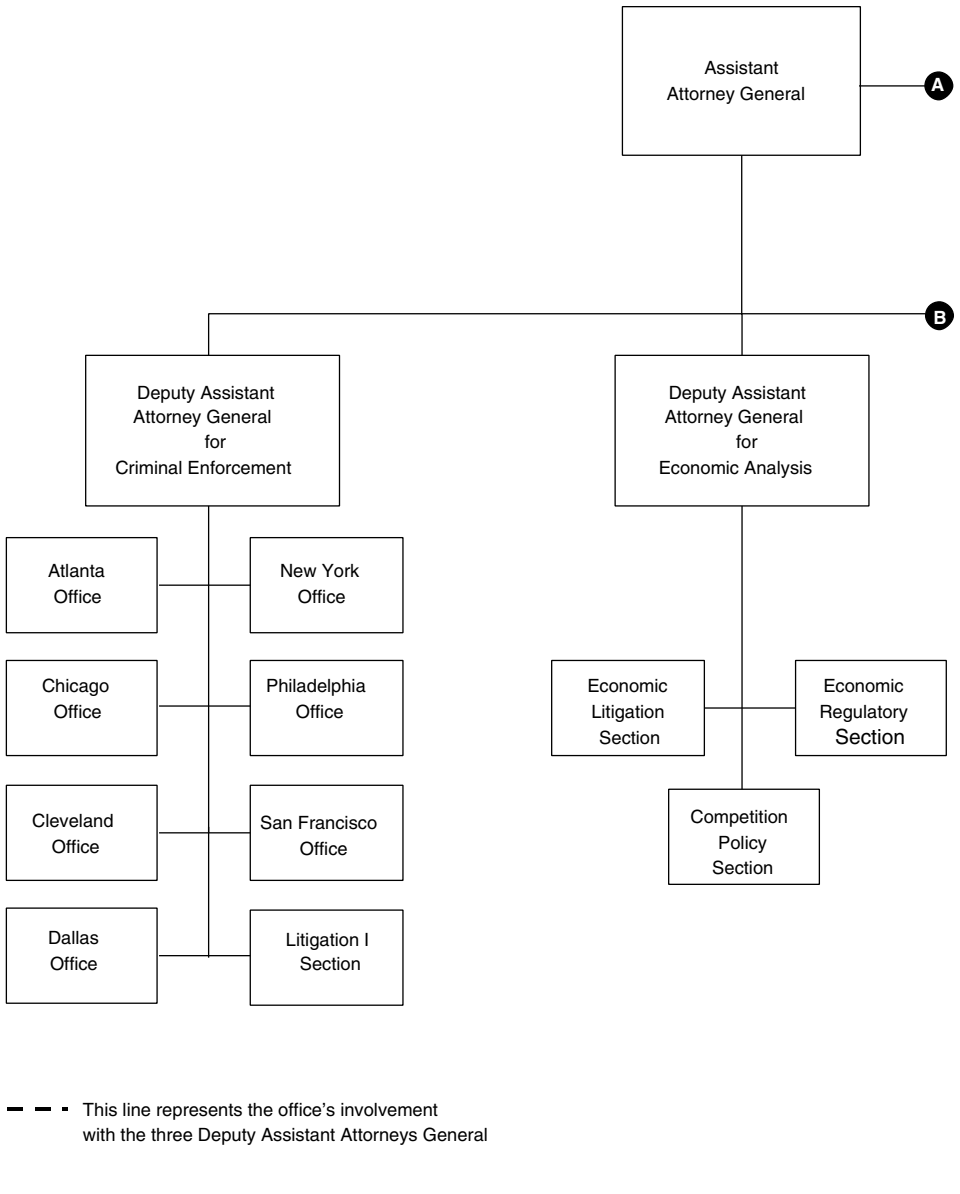
was appointed in January 2000).[1] The special counsels are generally responsible for:

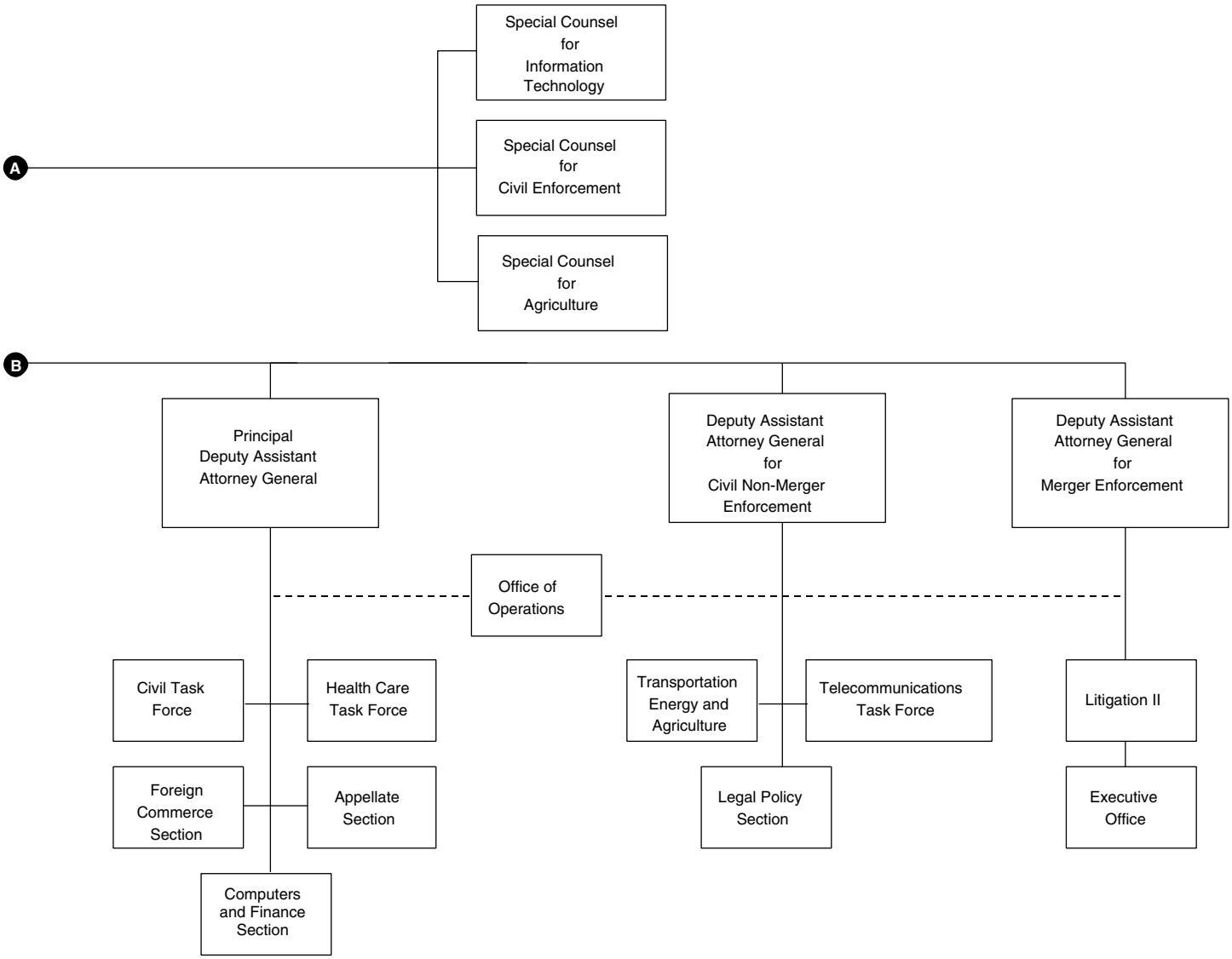
- maintaining expertise in assigned program areas and the competitive issues affecting them;
- advising the AAG and other senior Division management about enforcement priorities in assigned program areas and assisting in the development and implementation of Division policy in these areas;
- assisting the Division in articulating its views on issues involving assigned program areas before other government entities, the press, the bar, and the public; and
- participating as appropriate in the identification of potential investigations assigned to program areas and any resulting investigation or enforcement action.

The Division also has five Deputy Assistant Attorneys General (DAAG), at least one of whom has traditionally been a career employee; and three Directors of Enforcement, one of whom serves as the Director of Operations. Each DAAG has a number of components that report to him or her. (See fig. 1.)

[1]Currently, only the Special Counsel for Agriculture remains. More may be added by the new Assistant Attorney General when he arrives.

**Figure 1: Antitrust Division's Organizational Chart, as of November 2000**






Source: Antitrust Division.

The DAAG for Criminal Enforcement, who traditionally has been a career employee, has overall supervisory and management responsibility for the Litigation I Section and the Division's seven field offices and is primarily responsible for the Division's criminal enforcement program. The civil enforcement responsibilities are divided among the remaining three legal DAAGs.

The DAAG for Economic Analysis[2] has supervisory and management responsibility for the three economic sections (i.e., Economic Litigation, Economic Regulatory, and Competition Policy). The Economic Litigation Section focuses on general industries that historically have not been regulated; it also has a Corporate Finance Unit, which provides financial analyses of failing firm defenses, divestitures, and efficiencies defenses; makes recommendations as to fines; and reviews financial issues involved in damage analyses and other issues requiring financial, accounting, and corporate analysis. The Economic Regulatory Section focuses on industries that currently are regulated or historically have been regulated (e.g., telecommunications, airlines, and energy matters). The Competition Policy Section assists in matters that have a strong foreign outreach connection as well as matters involving certain specialized industries.

In total, the economic sections are made up of 52 full-time and 3 part-time economists. According to a Division official, the economic sections have a common pool of staff members. Although economists are assigned to one of the three sections, in practice they work for all three sections. According to a Division official, this practice helps balance workload.

The three Directors of Enforcement—which include the Director of Merger Enforcement, the Director of Civil Non-Merger Enforcement, and the Director of Criminal Enforcement—have direct supervisory authority over the activities of the various litigating sections, task forces, and field offices, each of which is headed by a Chief and Assistant Chief. These sections, task forces, and field offices carry out the bulk of the Division's investigatory and litigation activities. According to the Division manual, the three Directors of Enforcement work closely with the DAAGs in overseeing Division activities. Four special assistants to the Directors of Enforcement are each assigned several sections and field offices and play

[2]In 1985, the head economist was elevated to the position of DAAG for Economics and began to report directly to the Division's AAG. Prior to then, the Economics Director formally reported to one of the Division's DAAGs.

a liaison role between those sections and the Directors, in addition to performing other duties as assigned by the Directors. The senior Special Assistant also serves as the Liaison Officer to FTC.

The Director of the Office of Operations, who also serves as one of the Directors of Enforcement, reports to the AAG. The Office of Operations coordinates the policies and procedures governing the Division's civil investigations and enforcement actions and includes four support units. The Premerger Notification Unit/FTC Liaison Office (commonly referred to as the Premerger Office) receives the Division's copy of all Hart-Scott-Rodino filings and assigns them to the appropriate sections. The Premerger Office communicates to FTC the Division's interest in conducting an investigation or its willingness to grant early termination of the filing period. The Freedom of Information Act (FOIA) Unit is responsible for receiving, evaluating, and processing all FOIA requests made of the Division; assisting in the preparation of materials to be provided to state attorneys general; and maintaining and indexing pleadings, business review letters, and other frequently used files. The Paralegal Unit provides paralegal support on request to investigations and cases handled in Washington, D.C., and the field offices. The Training Unit coordinates training opportunities for the Division's legal and support personnel.

The Division has seven Washington, D.C., litigating sections and task forces, including the following:

- The *Computers and Finance Section* enforces antitrust laws and competition policy in the banking, finance, insurance, securities, and computer industries.
- The *Civil Task Force* handles civil nonmerger antitrust enforcement in some assigned industries, in intellectual property matters, and in all industries not specifically assigned elsewhere and handles merger matters in its assigned industries.
- The *Health Care Task Force* investigates and litigates civil merger and nonmerger antitrust law violations involving the health care industry and provides legal guidance to the American health care industry through an extensive business review program.
- The *Litigation I Section* conducts criminal investigations and litigation in conjunction with its field office counterparts.
- The *Litigation II Section* enforces antitrust laws with regard to mergers and acquisitions in unregulated industries; handles some civil nonmerger work in its assigned industries; and reviews, investigates, and litigates

matters in a large variety of industries.[3] This section is also responsible for the review of bank mergers.

- The *Telecommunications Task Force* enforces antitrust laws and promotes procompetitive regulatory policies in the communications industry, investigating and litigating violations of antitrust laws within that industry, and participating in proceedings before the Federal Communications Commission.
- The *Transportation, Energy and Agriculture Section* enforces antitrust laws and promotes procompetitive regulatory policies in transportation, energy, and agricultural commodities, investigating and litigating violations of antitrust laws within those industries, and participating in proceedings before a number of federal regulatory agencies, including the Department of Agriculture; and prepares reports to Congress and the executive branch on policy issues related to various transportation, energy, and agriculture industries.

The Division's seven field offices conduct criminal investigations and litigation. Field offices also handle some civil merger and nonmerger matters, depending on resource availability and particular expertise. The offices act as the field liaison with U.S. Attorneys, state attorneys general, and other law enforcement agencies within their areas of jurisdiction (see table 8).

**Table 8: Antitrust Division Field Offices**

| Field office | States covered by the field offices |
|---|---|
| Atlanta | Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, U.S. Virgin Islands |
| Chicago | Colorado, Illinois, Indiana, Iowa, Kansas, West District of Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Wisconsin |
| Cleveland | Kentucky, Eastern District of Michigan, Ohio, West Virginia |
| Dallas | Texas, Oklahoma, Louisiana, New Mexico, Arkansas |
| New York | Connecticut, Maine, Massachusetts, New Hampshire, Northern New Jersey, New York, Rhode Island, Vermont |
| Philadelphia | Delaware, Maryland, Southern New Jersey, Pennsylvania, Virginia |
| San Francisco | Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, Wyoming |

Source: Antitrust Division.

[3]Prior to July 1999, the Division had eight sections. In July 1999, the Merger Task Force was folded into the Litigation II Task Force. The Merger Task Force was responsible for the enforcement of the antitrust laws with regard to mergers and acquisitions in its assigned unregulated industries. It also handled some civil nonmerger work in those industries.

The Division also has several specialized components, in addition to those included in the Office of Operations, that assist in carrying out the Division's mission.

- The *Executive Office* formulates and administers the Division's budget, manages its reporting and records, handles personnel matters, and provides information systems services for all Division activities. This Office includes the Information Services Support Group, which provides automated services and resources to handle information in support of the Division's attorneys, economists, and managers.
- The *Appellate Section* represents the Division in appeals to the U.S. Courts of Appeals and appeals before the U.S. Supreme Court.
- The *Legal Policy Section* provides analyses of complex antitrust policy matters; coordinates the Division's legislative program; and handles long-range planning, projects, and programs of special interest to the AAG. This Section includes the Legislative Unit, which coordinates the Division's relations with Congress and responds to congressional requests and inquiries of the Division.
- The *Foreign Commerce Section* assists other sections in matters with international aspects and is primarily responsible for the development of Division policy on international antitrust enforcement and competition issues involving international trade and investment.

# Appendix III: Overview of the Antitrust Division's Policies and Procedures for Investigating Potential Antitrust Violations

The Antitrust Division is responsible for, among other things, promoting and maintaining competition in the United States by enforcing the federal antitrust laws. It is charged with investigating and prosecuting violations of these laws. The Division's *Antitrust Division Manual*[1] is intended to provide a comprehensive source of information about the Division's mission and investigative and enforcement procedures and practices. The following is a general overview of the antitrust investigative and enforcement processes, up to the point at which an enforcement action is filed, for the three principal types of antitrust enforcement actions brought by the Division—Hart-Scott-Rodino merger enforcement actions, civil enforcement actions, and criminal prosecutions.[2]

## Identification of Possible Antitrust Violations

The Division may become aware of a possible antitrust violation through a variety of sources, including a confidential informant; individuals or corporations applying for amnesty; complaints and referrals from other government departments or agencies; an anonymous tip; or through reviews of newspapers, journals, and trade publications. New investigations may also begin with information the Division obtains in other grand jury proceedings, or in merger filings required by the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act, 15 U.S.C. 18a). Economists from one of the Economic Analysis Group sections may also discover a possible anticompetitive activity, which they would then discuss with an attorney in one of the Division's legal sections.

## Preliminary Inquiry Process

When an attorney makes a determination that there is sufficient evidence to open an investigation beyond discussions with the complainant, he or she is to draft a preliminary inquiry (PI) request memorandum to the section, task force, or field office[3] chief describing the conduct involved

[1]The last comprehensive revision was issued in February 1998.

[2]We developed the description of the processes from discussions with Division officials, information obtained from the Division, and our review of the *Antitrust Division Manual*. According to Division officials, figures 2 through 4 and the accompanying narrative fairly describe a typical antitrust investigative and enforcement process. However, Division officials said that no two investigations are exactly alike, and, therefore, the Division's processes are flexible. Additionally, they noted that for any significant matter, there is ongoing consultation at all levels within the Division, including at the DAAG and AAG levels.

[3]Hereafter this appendix refers to sections and task forces as sections and field offices as offices.

and the possible violation. For civil matters, the memorandum is also to state whether the economist concurs. The memorandum is to include, among other things

- a factual summary of the information upon which the request is based,
- evidence supporting a potential antitrust violation as well as any contrary evidence,
- an evaluation of the significance of the matter from an economic and antitrust perspective, and
- a description of the proposed course of the investigation.

Additionally, the memorandum is to include basic information on (1) the commodity or service to be investigated; (2) the alleged anticompetitive conduct or merger and, for civil matters, the theory of competitive harm; (3) the relevant statute; (4) the parties involved; (5) the amount of commerce affected on an annual basis; and (6) the geographic area involved.

If the section chief does not agree with the staff's recommendation to open a PI, no further action is taken. If the section chief agrees with the recommendation, he or she is to submit a request to Operations or, in the case of a criminal PI, to the Office of Criminal Enforcement. The appropriate Director of Enforcement is to approve or disapprove the PI request on the basis of four standards: (1) the facts presented must provide sufficient indications of an antitrust violation; (2) the amount of commerce affected must be substantial, or the matter must have some broader significance or implicate an important legal principle; (3) the investigation should not needlessly duplicate or interfere with other efforts of the Division, FTC, a U.S. Attorney, or a state Attorney General; and (4) Division resources must be available for the investigation.

Because both the Division and FTC have antitrust jurisdiction, they must agree on which agency is to conduct the investigation.[4] To ensure that both agencies are not investigating the same conduct, they have established clearance procedures to determine which agency will

[4]Although clearance is also required for the opening or expansion of a criminal investigation, the Division handles all criminal matters and, according to Division officials, FTC routinely grants clearance as long as it agrees that the matter is criminal in nature.

investigate a potential violation.[5] If either the Division or FTC objects to the other agency conducting the investigation, the staffs are to follow the clearance dispute procedures to determine which agency will proceed with the investigation.[6] According to Division and FTC officials, clearance disputes are relatively rare.

Clearance must be obtained for all PIs, business reviews, grand jury requests that have not resulted from an existing PI, and any expansion of a previously cleared matter. The agencies cannot begin a PI until clearance is granted.[7] For a typical investigation, the clearance request is to specify, among other things, the parties to be investigated, the product line involved, the potential offenses, and the geographic area. The Division's Premerger Notification Unit/FTC Liaison Office oversees the clearance process.

The primary determinant of which agency will conduct an investigation is current agency expertise about the product or service market(s) at issue, so that a merger will usually be reviewed by whichever of the two agencies is most knowledgeable about the relevant market(s). According to Division and FTC officials, the Division has investigated the preponderance of mergers affecting agriculture, with a prominent exception being grocery store transactions, in which FTC has substantial experience and expertise. The Division has handled investigations in the cattle, hog, and lamb sectors, and FTC has traditionally handled investigations in the poultry sector.

[5]The first interagency agreement was informally instituted in 1938; since 1948, it has been modified and formalized. On December 2, 1993, FTC and Justice jointly issued "Clearance Procedures for Investigations." On March 23, 1995, FTC and Justice jointly announced "Hart-Scott-Rodino Premerger Program Improvements." These improvements included a commitment by each agency to resolve clearance on matters where an HSR filing was made within 9 business days of receipt of the HSR filings for a merger, and 7 business days of receipt of a filing in a cash tender offer or a notification involving an acquisition in bankruptcy.

[6]According to Division officials, the criteria for resolving clearance on civil nonmerger matters differ in one important respect from those used in merger matters. Although valuing expertise, they also give weight towards initiative. In the absence of overwhelming expertise in an area, the matter generally will be awarded to the agency that first identified the potential competitive problem and developed the proposed investigation.

[7]Division staff cannot contact private parties, except for complainants who approach the agencies on their own initiative, until clearance is obtained. However, they can develop information from public sources and governmental entities.

Once clearance is obtained and the PI is opened, staff are to investigate the merger or alleged conduct through interviewing complainants, customers, competitors, other possible witnesses and victims and reviewing other public sources of information. They may request information on a voluntary basis from any party involved. They also may use a compulsory process to obtain further information and documents.[8]

According to Division officials, the staff determine whether to conduct a criminal or civil investigation early in their deliberations, usually when the PI request is submitted. Where it is unclear whether the conduct in question would be a civil or criminal violation, the Division's policy is usually to open a civil investigation. This policy stems from two Supreme Court decisions[9] that place restrictions on the government's ability to use evidence gathered during the course of a grand jury investigation in a subsequent civil case.

After the staff evaluates the results of the PI, the attorneys and economist (in civil matters) are to recommend either closing the PI or proceeding with a civil or criminal investigation. For a civil matter, this means preparing a lawsuit for filing. For a criminal matter, this means convening a grand jury. In making this decision, the staff are to consult with their section or office chief and, in civil matters, the relevant economic analysis group chief to discuss the results of the PI.

To close a PI, the attorney is to prepare a closing memorandum. In a civil matter, the legal staff's memorandum is to state whether the economist concurs. The memorandum generally is to provide the factual and legal bases for the staffs' recommendation to close the PI.

Operations or, in criminal matters, the Office of Criminal Enforcement is to review the memorandum and consult with the appropriate DAAG and

[8]In most civil matters handled by the Division, both merger and nonmerger, Civil Investigative Demands (CIDs) can be used to compel production of information and documents if voluntary requests are judged to be inadequate or inappropriate for the Division's needs. Under the Antitrust Civil Process Act, CIDs may be served on any person, including suspected violators, potentially injured persons, witnesses, and record custodians, if there is reason to believe that the person may have documentary material or information relevant to a civil antitrust investigation.

[9]*United States v. Sells Engineering, Inc.,* 463 U.S. 418 (1983) and *United States v. Baggot*, 463 U.S. 476 (1983).

AAG if the matter involves significant policy questions.[10] The appropriate Director of Enforcement then notifies the cognizant section or office chief of the decision to close the PI. Staff are to then notify the subjects of the investigation that the matter is closed and close the file on the matter.

## Hart-Scott-Rodino Merger Enforcement Process

Most mergers and acquisitions that have the potential to raise competitive concerns must be reported to the Division and FTC before they occur. The premerger notification provisions of the Hart-Scott-Rodino Act require companies exceeding certain thresholds of company size and value of the transaction to notify the Antitrust Division and FTC of the proposed merger transaction,[11] submit documents and other information to the agencies concerning the transaction,[12] and refrain from closing the transactions until a specified waiting period has expired.[13]

[10]The Division's AAG has full supervisory authority over the activities of the Antitrust Division, including the authority to become involved in any investigation at any stage. The DAAGs also have the authority to become involved in any investigation within their authority at any stage. The AAG may have other special legal assistants for specific areas, such as the Special Counsel for Agriculture. These special legal assistants have delegated authority to involve themselves in any matter within their areas of responsibility.

[11]FTC's Premerger Notification Office is responsible for administering the HSR premerger notification program for both the Division and FTC. The Premerger Notification Office has the ultimate responsibility for accepting the filing or rejecting it if it is deemed to be incomplete.

[12]The parties must provide the agencies with information concerning the parties to the transaction and the structure of the transaction; information concerning each party's revenues, by Standard Industrial Classification codes; copies of certain Securities & Exchange Commission filings and annual reports; information related to prior relevant acquisitions; and certain certifications. Additionally, each party is required to submit copies of any documents that have been prepared in connection with the transaction by or for any officer or director that analyze the competition aspects of the transaction. The filing must be accompanied by a filing fee, which, for the period we reviewed, was $45,000 regardless of the value of the transaction. However, the HSR filing fees were amended effective February 1, 2001, and are now set at $45,000 for transactions valued at less than $100 million; $125,000 for transactions valued at $100 million to less than $500 million; $280,000 for transactions valued at $500 million or more. (Departments of Commerce, Justice, and State, the Judiciary, and related agencies Appropriations Act, 2001, P.L. 106-553, section 630 (Dec. 21, 2000)) These dollar thresholds will be adjusted annually, beginning with fiscal year 2005, to reflect changes in the gross national product during the previous fiscal year.

[13]Failure to comply with the HSR Act is punishable by a civil penalty of up to $11,000 per day, and parties not in compliance are subject to injunctive and other equitable relief.

There are three tests, all of which must be met in order for the transaction to be reportable.[14] The first test is the commerce test, in which either the acquiring party or the acquired party must be engaged in commerce or in any activity affecting interstate commerce, as defined in Section 1 of the Clayton Act. The second test is the size-of-person test. For the period we reviewed, one party to the transaction had to have annual sales or assets of at least $100 million and the other party of at least $10 million.[15] The third test is the size-of-transaction test. Under this test, for the period we reviewed, as a result of such acquisition, the acquiring party had to hold (1) voting securities or assets worth in the aggregate more than $15 million, or (2) voting securities that confer control (50 percent) of an issuer with annual sales of $25 million or more.[16]

HSR merger reviews usually begin with the parties filing a proposed merger. However, the Division also may become aware of a merger prior to the required filing through other sources, such as its own research or notification by a concerned citizen. The Division has up to 30 days (15 days for cash tender offers and bankruptcy filings) from the time of the filing of the proposed merger to review the filing and make a determination as to whether the Division should seek additional information and documents from the merging parties and thereby extend the waiting period to enable further review. Generally, staff should decide within 5 business days of receipt of an HSR filing (3 days in the case of a cash tender offer or a bankruptcy filing) whether the filing raises competitive issues that need to be investigated. According to Division officials, in markets already characterized by high concentration levels, there is a substantially increased likelihood that a proposed merger will be investigated.

[14]Unless otherwise noted, the discussion of the tests for reportability pertains to the period we reviewed. Legislation that took effect February 1, 2001, made changes in these tests. (Departments of Commerce, Justice, and State, the Judiciary, and related agencies Appropriations Act, 2001, P.L. 106-553, section 630 (Dec. 21, 2000)).

[15]When the acquired party is not engaged in manufacturing and does not have at least $100 million of sales or assets, then it must have assets of at least $10 million.

[16]See 15 U.S.C. 18a(a) and 16 C.F.R. 802.20. The legislation that took effect on February 1, 2001, discussed in footnote14, raised the size-of-transaction threshold from $15 million to $50 million. The legislation also eliminated the alternative percentage threshold. Accordingly, no transaction resulting in an acquiring person holding less than $50 million or voting securities of an acquired person will be reportable. In addition, under the new legislation, transactions valued at greater than $200 million are reportable without regard to whether the size-of-person threshold is met.

The majority of mergers that raise antitrust concerns are horizontal mergers. According to Division officials, the Division's and FTC's joint *Horizontal Merger Guidelines* are a reasonably accurate portrayal of how the Division and FTC generally conduct their analyses of proposed mergers.[17] The guidelines were originally developed in 1982 and were updated in 1992. In 1997, the efficiencies section of the guidelines was expanded.[18] The unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or facilitate its exercise. The guidelines define a seller's market power as the ability to profitably maintain selling prices above competitive levels for a significant period of time. Similarly, a buyer's market power is defined as the ability to profitably maintain buying prices below competitive levels for a significant period of time.[19]

The guidelines outline the five-step analytical process the Division is to use to determine whether a merger is likely to substantially lessen competition and, ultimately, whether to challenge a merger. The Division is to (1) delineate the relevant market and assess whether the merger would significantly increase concentration and result in a concentrated market;[20] (2) identify the market participants, assign shares, and assess

[17]The Division also has "Non-Horizontal Merger Guidelines" for mergers involving firms that do not operate in the same market. In addition, the Division and FTC issued joint "Antitrust Guidelines for Collaborations Among Competitors." These guidelines address a broad range of horizontal agreements among competitors, including joint ventures, strategic alliances, and other competitor collaborations. The Division and FTC also issued joint "Antitrust Guidelines for the Licensing of Intellectual Property." These guidelines set forth the antitrust enforcement policy of Justice and the FTC with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of know-how.

[18]The efficiencies section of the guidelines was revised and issued on April 8, 1997. The revised section states that the government will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.

[19]According to the Division, in most instances, the concern raised by a merger is the ability of the merging companies to raise above the competitive level the price of the products or services they sell. However, in some instances, the concern will be that the merger will substantially lessen competition with respect to the price that the merging companies pay for the products or services they purchase.

[20]Once a market is defined, the market shares of competitors within the market are determined and the Herfindahl-Hirshman Index (HHI) is calculated by squaring the market shares of each firm and adding them to determine market concentration. A postmerger HHI below 1,000 indicates an unconcentrated market. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and usually require no further analysis.

whether increased market concentration from the proposed merger raises concern about potential adverse competitive effects; (3) assess whether entry into the market would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern; (4) assess any efficiency gains that cannot be reasonably achieved by the parties absent the proposed merger; and (5) determine whether, but for the merger, either party to the transaction would be likely to fail and exit the market.

If the attorney, in consultation with the economist, concludes that the information reviewed does not raise significant competitive concerns, the attorney is to submit a "no interest" form[21] and, with the section chief's concurrence, no investigation is opened.[22] If the "no interest" decision is made in time, the Division will typically request that FTC grant "early

A post-merger HHI between 1,000 and 1,800 indicates moderate concentration. Mergers producing an increase in the HHI of less than 100 points in moderately concentrated markets postmerger are unlikely to have adverse competitive effects and generally require no further analysis. Mergers resulting in an increase in the HHI of more than 100 points in moderately concentrated markets postmerger potentially raise significant competitive concerns. A postmerger HHI above 1,800 indicates a highly concentrated market. Mergers producing an increase in the HHI of less than 50 points even in highly concentrated markets postmerger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers resulting in an increase in the HHI of more than 50 points in highly concentrated markets postmerger potentially raise significant competitive concerns.

When the postmerger HHI exceeds 1,800, the Division assumes that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. However, this assumption may be refuted by showing that other factors in the guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

[21]The no-interest form records such information as the identity of the parties, the HSR transaction number, SIC codes, product and geographic overlaps, and a summary of the transaction. Staff also are to explain why they recommend that no investigation be initiated.

[22]According to Division officials, the Division and FTC undertake their review of a merger in order to determine whether to challenge the merger. Therefore, they do not "approve" a merger, but rather decide not to challenge it. Moreover, the Division and FTC are not precluded from pursuing enforcement actions even after the transaction has closed.

termination" of the waiting period when requested in writing by one of the merging parties.[23]

If the attorney, in consultation with the economist, concludes that the information reviewed raises significant competitive concerns warranting a more thorough review, the attorney is to submit a request to open a PI. The PI request is to be reviewed by the section chief and, if the section chief concurs, by Operations. While deciding whether to authorize the PI, Operations is to request clearance to proceed from FTC. If clearance is granted to the Division, the Director of Merger Enforcement in Operations decides whether to authorize the PI. According to Division officials, Operations generally approves merger PI requests.

If the PI is authorized, the attorney and economist are to investigate the proposed merger during the initial waiting period, generally using voluntary procedures.[24] They are to determine whether the proposed transaction raises issues substantial enough to warrant the issuance of a second request. At this point, the merging parties often begin to meet with Division staff to discuss any problems the Division has with the proposal and to provide their own analysis of the transaction.[25]

If the attorney concludes, in consultation with the economist, that there are no significant competitive concerns, then the attorney is to submit a memorandum to the section chief recommending that the investigation be closed. If the section chief concurs, the memorandum is to be sent to Operations, where the Director of Merger Enforcement makes the final decision on whether to close the investigation. If the attorney concludes, in consultation with the economist, that there are significant competitive

[23]Section 7A(b)(2) of the Clayton Act, 15 U.S.C. 18a(b)(2), authorizes FTC and the Division to grant early termination of the act's waiting period. Early termination will normally be granted where (1) it has been requested in writing, (2) all parties have submitted their notification and report forms, and (3) both enforcement agencies have determined not to take enforcement action. All early terminations must be cleared through FTC, and the act requires that notice that early termination has been granted be published in the *Federal Register*. FTC is responsible for notifying parties that early termination has been granted by both agencies, even in situations where the investigation has been cleared to the Division.

[24]When PI authority is granted, staff may begin contacting customers, trade associations, competitors, and other relevant parties to more thoroughly assess whether there are likely competitive concerns in any relevant markets.

[25]The merging parties, generally through their counsel, and often their economists as well, typically meet with Division staff at different stages throughout the process to discuss their proposed merger.

concerns that require the Division to obtain additional information to be obtained from the parties to enable a more thorough review, the attorney is to submit a proposed "Second Request" for that information to be submitted to the merging parties before the waiting period expires.[26]

The proposed second request is to be reviewed by the section chief and, if the section chief concurs, by Operations, where the Director of Merger Enforcement makes the final decision whether to approve the second request. According to Division officials, if the second request is not approved, the investigation typically is closed.

If the second request is approved, it is sent to the merging parties. For the period we reviewed, this extended the waiting period until 20 days (10 days for cash tender offers and bankruptcy sales) after the merging parties substantially comply with the second request.[27] In order for the extended waiting period to end, the merging parties must substantially comply with the second request. The attorney also may apply for authorization to issue CIDs to any person. According to Division officials, the attorney and merging parties will likely meet to discuss the competitive concerns as well as any possible modifications to the second request.

When the merging parties have supplied the information requested, they are to certify substantial compliance with the second request. If the attorney does not agree that the parties are in substantial compliance, the attorney is to notify the merging parties of the areas of noncompliance and submit a proposed deficiency letter to the section chief. If the section chief concurs, the letter is to be sent to the merging parties, and the waiting period is further extended.

[26]In April 2000, the Division issued a press release announcing improvements to its merger review procedures. The improvements are intended to make the process for obtaining additional information in a merger investigation more efficient for the business community and the Division and, according to the Division, are continuations or extensions of existing practices. The improvements include (1) centralized high-level review of second requests prior to issuance, (2) early conferences with the merging parties to identify competitive issues, (3) quick turn-around of requests for modifications of a second request, (4) new procedures for appealing second request issues, (5) specialized staff training on second request investigations, and (6) ongoing consultation with the industry and the private bar to identify further means of easing the merger review process.

[27]The legislation that took effect on February 1, 2001, discussed in footnote 14, extended the 20 day period to 30 days, while leaving the 10-day period for cash tender offers and bankruptcy sales unchanged.

If the attorney agrees that there has been substantial compliance with the second request, or if the section chief does not concur in sending the deficiency letter, the waiting period is not further extended and comes to an end within the prescribed number of days after certification of substantial compliance.

If the attorney concludes in consultation with the economist that the merger is not likely to substantially lessen competition in violation of the antitrust laws, the attorney is to submit a memorandum to the section chief recommending that the investigation be closed. If the section chief concurs, the memorandum is to be sent to Operations, where the Director of Merger Enforcement decides whether to close the investigation. If the Director of Merger Enforcement approves closing the investigation, the Division typically requests that FTC early terminate the extended waiting period.[28]

If the attorney concludes in consultation with the economist that the merger is likely to substantially lessen competition in violation of the antitrust laws, the attorney is to inform the section chief. If the section chief concurs, Operations is to consider the matter in consultation with the attorney, the economist, the section chief, and the relevant DAAGs. If the section chief does not concur with the attorney's conclusion, then the investigation is typically closed; or occasionally, it is sent back to the attorney for further work.

If the Director of Merger Enforcement concurs with the attorney's conclusion, the attorney is to notify the merging parties of the specific competitive concerns and that staff intends to recommend challenging the merger in court if the parties proceed with the merger as proposed. If the Director does not concur, the investigation is closed or, occasionally, sent back to the section for further work.

If the Division determines that the proposed merger is anticompetitive, the merging parties may offer to divest assets in a manner that resolves the competitive concerns. If they do so, the Division files a complaint and proposed consent decree with the court that binds the parties to the

[28]Early termination may be granted even absent a request from a merging party in instances in which a second request has been issued.

arrangement.[29] Alternatively, the merging parties may elect to "fix it first" by divesting the assets of competitive concern before the merger takes place, or to "restructure" the merger by forgoing acquisition of those specific assets in the first place.[30]

If the merging parties do not offer to divest assets in a manner that resolves the competitive concerns, the attorney is to submit a case recommendation package to the section chief. [31] The package is to include the recommendation memorandum, an order of proof with the key documents and other evidentiary support, a draft complaint, and draft motions for temporary restraining order and preliminary injunction. The case recommendation memorandum is to include, among other things:

- the date by which the Division must file any temporary restraining order or preliminary injunction papers, and any other dates that bear on timing;
- a brief description of the transaction, including the identity of the merging parties, the form of the transaction, and the consideration;
- a brief description of the proposed suit, including proposed defendants, the statutes under which the merger is to be challenged, the proposed judicial district, and the relief sought;
- a general description of the impact of the transaction, including the relevant product and geographic markets, volume of commerce, market shares, and HHIs;
- a brief description of the basic theory of competitive harm;
- a short discussion of the weaknesses of the case;

[29]The Antitrust Procedures and Penalties Act (also known as the Tunney Act) requires that a competitive impact statement be filed with every proposed consent decree. 15 U.S.C. 16. A competitive impact statement is the Division's explanation of its case, the proposed judgment, and the circumstances surrounding the judgment.

[30]Because a "fix it first" resolution does not involve a case being filed, no complaint, stipulation, competitive impact statement, *Federal Register* notice, or newspaper notice is necessary. However, staff is to prepare a case recommendation memorandum and draft press release, along with any documents necessary to understand the proposed resolution.

[31]According to the Division manual, the expertise and capabilities of Division economists should be fully utilized as a resource in thorough prefiling preparation for litigation, particularly in merger and other civil matters. The Division's Economic Analysis Group assigns one or more economists to each merger or civil nonmerger matter to assist the legal staff in investigating and analyzing the competitive effects of the proposed acquisition or other conduct being investigated. Additionally, Division economists and the Division's Economic Analysis Group are to participate fully in, among other things, developing and implementing quantitative analysis of anticompetitive effects of mergers and other business conduct, and in providing or securing expert economic testimony.

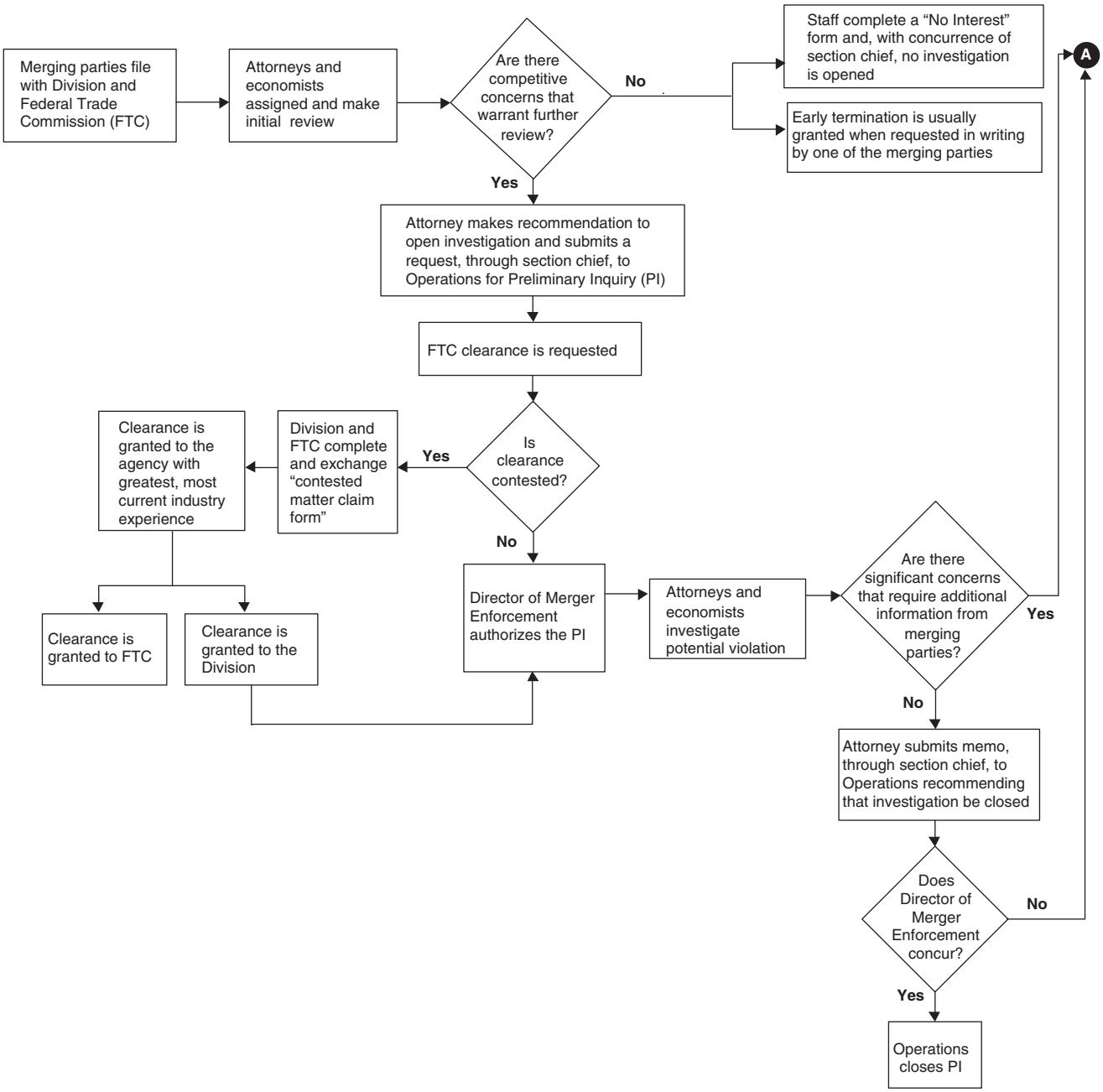
- any settlement possibilities; and
- an explanation of why litigation is worth the expenditure of the necessary Division resources.

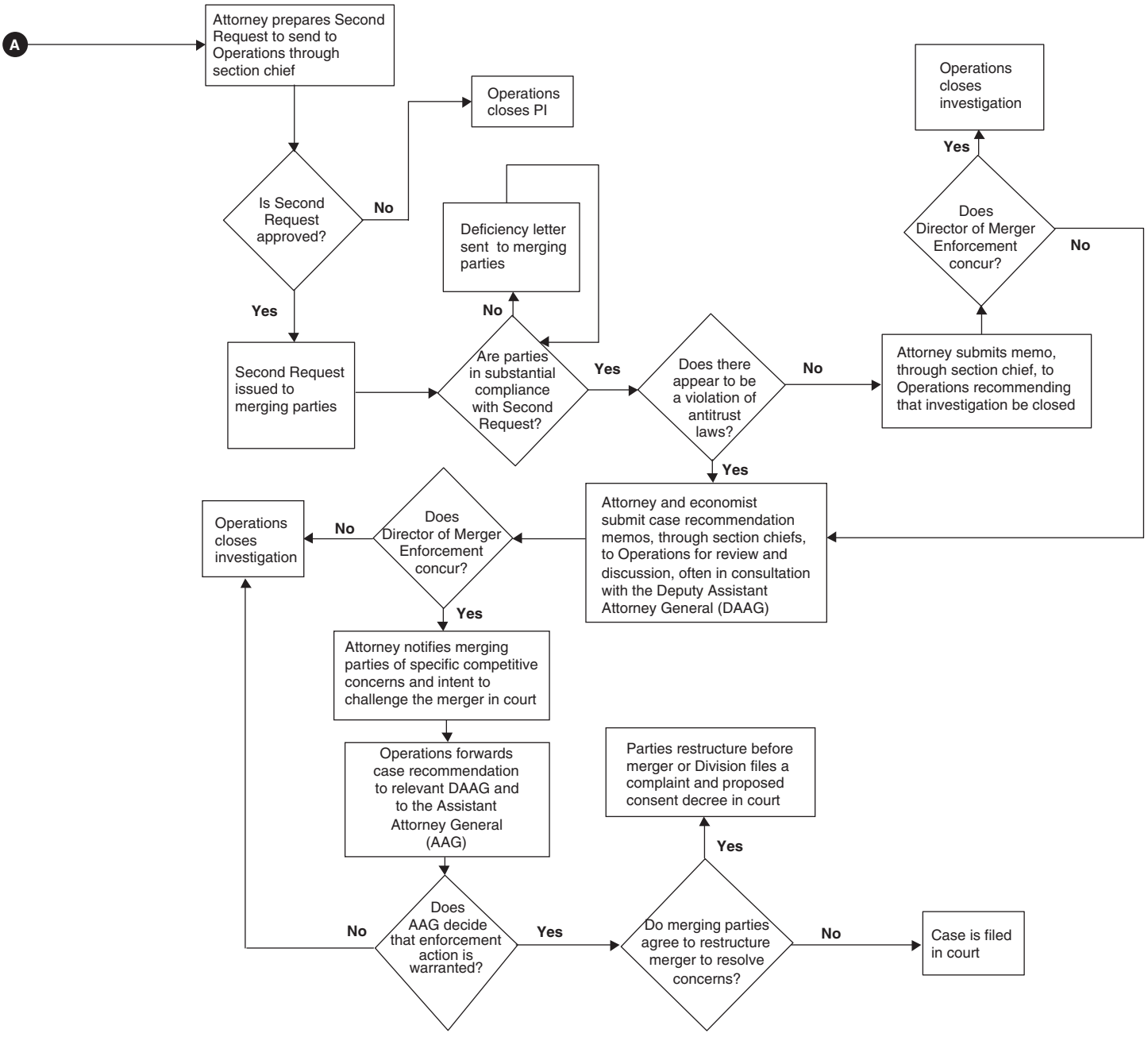
The economist also provides a memorandum on the key economic issues. These memorandums and accompanying materials are to be forwarded to Operations and to the relevant DAAG. After conferring, they make a recommendation to the AAG.

At this point, the merging parties may request meetings with the Director of Enforcement, the DAAG, and the AAG to discuss the merger. During this period, the merging parties may still offer to divest assets to resolve the competitive concerns. If the parties do not offer to divest assets in a manner that resolves the competitive concerns, and if the AAG approves taking enforcement action, the Division files a complaint and, usually, motions for a preliminary injunction and a temporary restraining order with the court. The preliminary injunction prevents consummation of the transaction before the court can determine its legality. If the AAG does not approve taking enforcement action, the investigation is closed.

Figure 2 shows the general process the Division follows for HSR merger enforcement actions.

**Figure 2: Flowchart of Antitrust Division's General Process for HSR Merger Enforcement**






Source: Developed by GAO on the basis of the Antitrust Division Manual and discussions with Division officials.

## Civil NonMerger and Non-HSR Merger Enforcement Process

When alleged conduct would not be appropriate for criminal prosecution but might be found to be anticompetitive, the Division may initiate a civil investigation. Civil investigations differ from criminal investigations in the involvement of the Division's economists and in the manner of the Division's interaction with the parties under investigation. The Division generally follows the same procedures for reviewing civil non-HSR mergers and HSR mergers, except that non-HSR merger investigations are not subject to statutorily prescribed waiting periods. The Division's procedures for reviewing non-HSR merger matters and civil nonmerger matters are also very similar.

Civil nonmerger matters involve the investigation and civil prosecution of a variety of conduct under Sections 1 and 2 of the Sherman Act. According to the Division, such conduct may constitute an illegal restraint of trade or unlawful monopolization or attempted monopolization. Examples of conduct that may raise competitive issues include strategic alliances between companies, joint ventures among suppliers, and misuse of intellectual property rights. According to the Division manual, considerations in civil matters include legal theory, relevant economic learning, the strength of the likely defense, any policy implications, and the potential doctrinal significance of the matter.

The investigative process begins when the Division becomes aware of potentially anticompetitive conduct, or a potentially anticompetitive merger not subject to HSR reporting, and it refers the matter to the appropriate section for handling. Attorney(s) and economist(s) are assigned to assess the conduct or merger using public sources of information. If the attorney, in consultation with the economist, concludes that the conduct or merger raises significant competitive concerns warranting a more thorough review, the attorney is to submit a request to open a PI. Otherwise, the attorney recommends that no action be taken; and, if the section chief concurs, no investigation is opened.

The PI request is to be reviewed by the section chief and, if the section chief concurs, by Operations. Before deciding whether to authorize the PI, Operations is to request clearance to proceed from FTC. If clearance is granted to the Division, the Director of Enforcement decides whether to authorize the PI. According to Division officials, civil PI requests are generally authorized.

If the PI is authorized, the attorney and the economist are to investigate the conduct or merger, generally using voluntary procedures, such as interviews and voluntary requests for documents. The attorney may also

apply for authorization from Operations to issue CIDs to parties subject to the investigation and to third parties who may have relevant information. According to the Division manual, a decision to issue CIDs generally involves a significant expansion in resources committed by the Division and should be made only after serious consideration and a thoughtful reassessment of the matter's potential significance.

If the attorney and economist recommend closing the investigation and if the section chief and Director of Enforcement concur, the investigation is closed. The closing recommendation is to include a description of the conduct or market involved in a violation, an analysis of competitive issues, a development of the facts and law, and recommendations. The Director of Enforcement may send the matter back for further work.

If the attorney, in consultation with the economist, concludes that the conduct or merger can be proven to violate the antitrust laws, the attorney is to submit a case recommendation to the Director of Enforcement. The case recommendation is to include the following information:

- a brief description of what the prospective case is fundamentally about;
- a conceptual discussion of the case and why it is an important one for the Division to bring, including the theory and statute(s) on which the case would be based; theories investigated but not recommended to be pursued; and the justifications or defenses likely to be raised by the prospective defendants;
- an assessment of whether the case is winnable at trial, including a short order of proof (which will typically be attached to the case recommendation as a separate document), a summary of the relative strengths and weaknesses of the evidence supporting the case, and a summary of likely defense evidence and arguments; and
- a discussion of potential settlement options.

The case recommendation is to be reviewed by the section chief, and if the section chief concurs, the recommendation is reviewed by Operations, in consultation with the attorney, the economist, the section chief, the economic chief, and often the relevant DAAGs. The economist is also to

submit a case recommendation memorandum on the key economic issues.[32]

If the Director of Enforcement does not concur, the investigation is closed or, occasionally, sent back to the section for further work. If the Director of Enforcement concurs in the attorney's conclusion, the attorney is to notify the parties of the Division's competitive concerns and that staff intends to recommend challenging the conduct or merger in court. Operations is to forward the case recommendation to the relevant DAAGs and to the AAG.

The AAG is to review the case recommendation and consider whether to bring an enforcement action. At this point, the parties may request meetings with the DAAG and with the AAG to discuss the matter.[33] The parties may offer to cease the conduct giving rise to the competitive concerns and take other action as necessary to resolve those concerns, or to restructure the merger to resolve the competitive concerns. If the offer satisfactorily resolves the competitive concerns, the attorney is to file a complaint and proposed consent decree in court.[34] If the parties do not satisfactorily offer to resolve the competitive concerns, and if the AAG approves taking enforcement action, he or she is to sign the pleadings and other documents. The Division then files a case in court and begins litigation. If the AAG does not approve taking enforcement action, the investigation is closed.

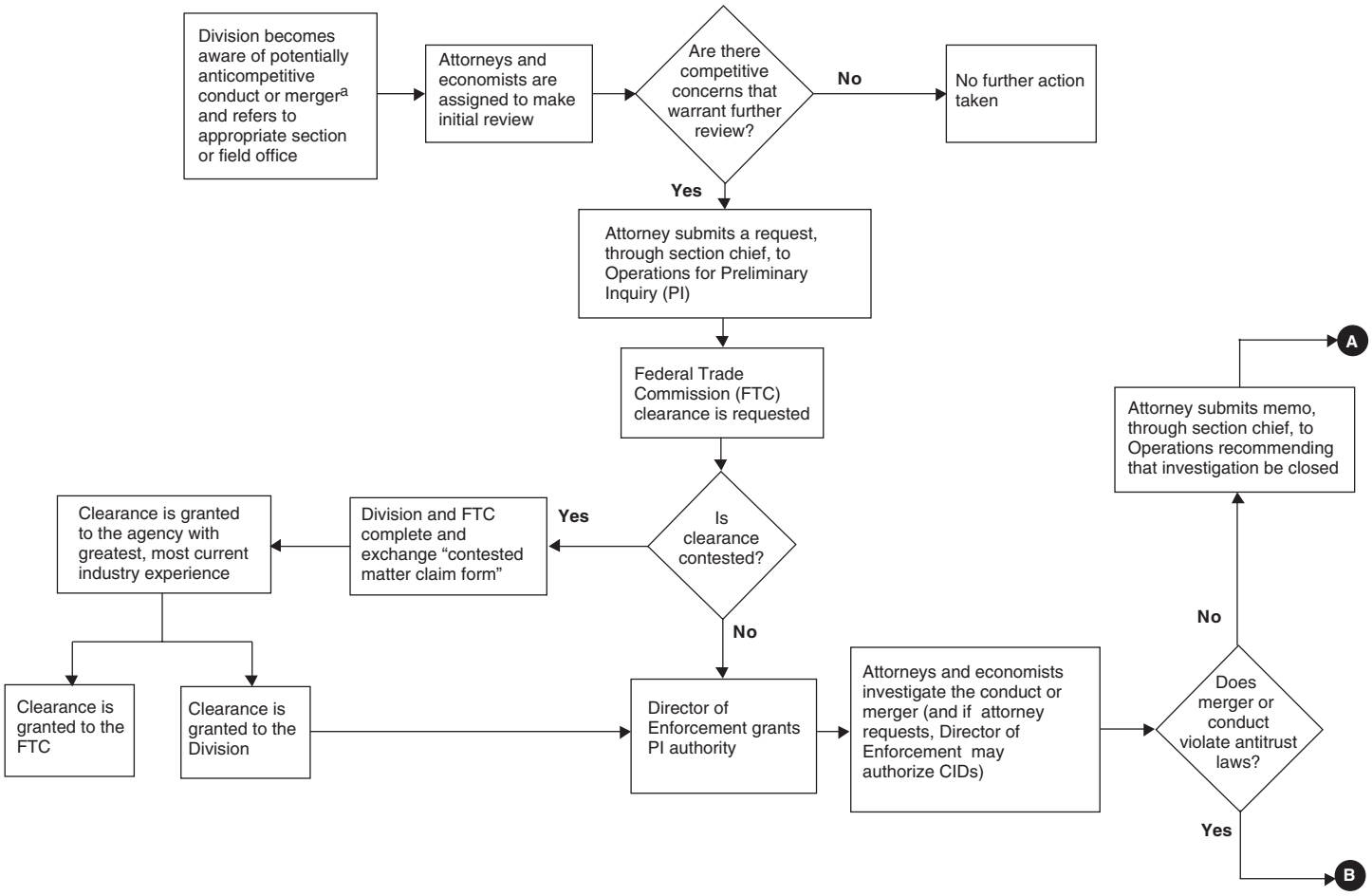
Figure 3 shows the general process the Division follows for civil nonmerger and non-HSR merger enforcement actions.

[32]According to a Division official, the economist's memorandum generally provides essential background information and focuses on the key economic issues. The memorandum follows the same review process as the attorney's case recommendation memorandum.

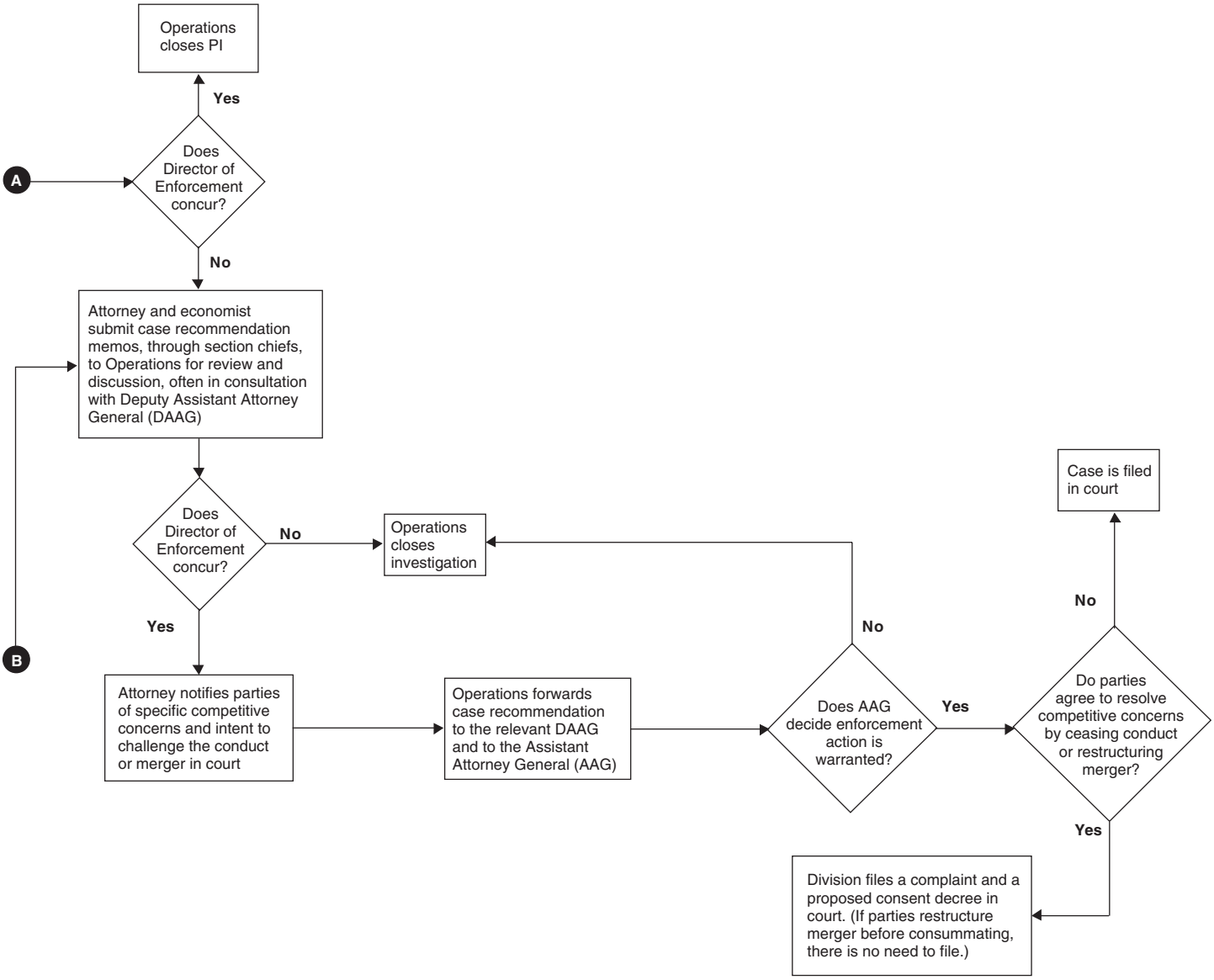
[33]The parties usually prepare their own position paper (also referred to as a "white paper"), including an economic analysis, and submit it to the Division.

[34]As with an HSR merger, in the case of a merger, the parties may elect to "fix it first" by divesting the assets of competitive concern before the merger takes place, or to "restructure" the merger by forgoing acquisition of those specific assets in the first place, in which case there is no complaint or consent decree filed in court.

**Figure 3: Flowchart of Antitrust Division's General Process for Civil Enforcement**




[a]Refer to figure III.1 for mergers for which a filing is received pursuant to the Hart-Scott-Rodino Act.




Source: Development by GAO on the basis of the Antitrust Division Manual and discussions with Division officials.

## Criminal Enforcement Process

When the Division becomes aware of a possible criminal antitrust violation, it assigns the matter to the appropriate section or office to handle the review. The attorney reviews the information to decide whether to seek authority to open a criminal investigation. If the attorney concludes that there is not sufficient evidence to warrant opening a criminal PI, and if the section or office chief concurs, the Division would not open a criminal investigation, but it might open a civil investigation.[35]

If the attorney concludes that there is not sufficient evidence to warrant opening a grand jury investigation, but there is sufficient evidence to warrant opening a preliminary inquiry, the attorney is to submit a PI request to the section or office chief. (If the attorney concludes that there is already sufficient evidence to warrant opening a grand jury investigation, the attorney may bypass the criminal PI and proceed directly to submit a request for grand jury authority to the section or office chief.) If the section or office chief concurs in the PI request, the request is to be sent to the Office of Criminal Enforcement. If the section or office chief does not concur in the PI request, a criminal investigation is not opened, but a civil investigation might be opened.

[35]Generally, decisions on whether to investigate a matter as a potential criminal violation or a potential civil violation are based on the nature of the conduct involved. Criminal enforcement is reserved for the most egregious, hard-core anticompetitive conduct, such as price fixing, bid rigging, and horizontal market allocation agreements. Other suspected antitrust violations are investigated civilly. Typically, it is readily apparent whether the allegations under investigation are of a nature that would warrant criminal prosecution. Occasionally, however, during the course of an investigation that is generally pursued criminally, the Division determines that unusual circumstances exist that would make criminal prosecution inappropriate. Situations that might lead the Division to proceed civilly rather than criminally include cases where (1) the legality of the conduct is not clear, (2) there are novel legal or factual issues, (3) prior prosecutorial decisions may have caused confusion about enforcement policies, or (4) there is clear evidence that the subjects of the investigation were not aware of the consequences of their actions.

If the Director of Criminal Enforcement approves the criminal PI request,[36] the Office of Criminal Enforcement is to request clearance from FTC through the clearance process; and, once clearance is obtained,[37] the attorney is to investigate the potential violation, using voluntary procedures. If the Director of Criminal Enforcement does not approve the criminal PI request, the Division would not open a criminal investigation, but it might open a civil investigation.

If the attorney concludes that the PI does not reveal sufficient evidence to warrant opening a grand jury investigation, the attorney is to submit a memorandum to the section or office chief recommending that the investigation be closed. If the section or office chief concurs with the closing memorandum, it is to be sent to the Director of Criminal Enforcement, who will close the criminal investigation or, occasionally, send it back to the section or office to develop more evidence. If the criminal investigation is closed, a civil investigation might be opened.

If the attorney concludes that the PI reveals sufficient evidence to warrant opening a grand jury investigation (or if the PI phase is bypassed and a grand jury is requested at the outset), the attorney is to submit a memorandum to the section or office chief outlining the evidence and requesting grand jury authority. To the extent possible, the request for grand jury authority is to

- identify the companies, individuals, industry, or commodity or service involved;
- estimate the amount of commerce involved on an annual basis;

[36]The decision on whether to open an investigation depends on three questions: (1) are the allegations or suspicions of a criminal violation sufficiently credible or plausible to call for a criminal investigation, which, according to the Division manual, is a matter of prosecutorial discretion; (2) is the matter significant, which is determined on a matter-by-matter basis based on such factors as volume of commerce affected, geographic area impacted, potential for expansion of the investigation or prosecution from a particular geographic area and industry to an investigation or prosecution in other areas or industries, the deterrent impact and visibility of the investigation and/or prosecution, the degree of culpability of conspirators, and whether the scheme involved a fraud on the federal government; and (3) what resources will be required to investigate and prosecute the matter, which, according to the Division manual, is asked only for matters that are assessed as having lesser significance.

[37]Because the Division handles all criminal investigations, clearance is not contested in a criminal matter, as long as FTC agrees that the matter is criminal in nature.

- identify the geographic area affected and the judicial district in which the investigation will be conducted;
- describe the suspected violations, including non-antitrust violations, and summarize the supporting evidence;
- evaluate the significance of the possible violation from an antitrust standpoint;
- explain any unusual issues or potential difficulties the staff has identified;
- identify the attorneys who will be assigned to the investigation;
- explain initial steps in the staff's proposed investigative plan; and
- estimate the duration of the investigation.

If the request is approved by the section or office chief, the Special Assistant is to prepare a memorandum for the Director of Criminal Enforcement, who makes a recommendation to the Division's AAG, with a copy to the DAAG. If the AAG does not approve the request, the criminal investigation is closed or, sometimes, sent back to the section or office to develop more evidence. If the criminal investigation is closed, a civil investigation might be opened.

If the grand jury request is approved by the AAG, the Office of Criminal Enforcement is to obtain FTC clearance if it has not already been obtained previously for a PI, or if the scope of the investigation is expanded. Then the attorney is to meet with the local U.S. Attorney's office, and a grand jury is convened.[38]

The grand jury investigation phase involves (1) issuing a subpoena to companies for records, (2) calling witnesses, and (3) presenting evidence on the alleged violation to the grand jury. After completing the grand jury investigation, the attorneys are to recommend either closing the investigation; proceeding with a criminal case and prosecuting the defendants; or, occasionally, continuing the investigation as a civil matter.

If the attorney concludes that the grand jury investigation does not reveal sufficient evidence to warrant filing criminal charges, the attorney is to submit a memorandum to the section or office chief recommending that the investigation be closed. If the section or office chief concurs with the closing memorandum, it is sent to the Director of Criminal Enforcement,

[38]The investigation must be conducted by a grand jury in a judicial district in which the violation occurred or in which subjects of the investigation do business.

who will either authorize closing the investigation or, occasionally, send it back to the section or office for further grand jury investigation.

If the attorney concludes that the grand jury investigation reveals sufficient evidence to warrant filing criminal charges, and if the section or office chief concurs, the attorney and section or office chief are to submit a memorandum to the Office of Criminal Enforcement recommending criminal action and providing the factual and legal bases of their investigation. The memorandum is to include the following information:

- a summary of the offense;
- a list and description of the proposed defendants;
- a summary of the evidence establishing the offense and a summary of the evidence against each proposed defendant;
- the names of the persons and companies that were potential targets of the investigations but are not being recommended for indictment;
- a detailed analysis of the weaknesses of the case, and any anticipated defenses, with appropriate staff responses; and
- a list of the defense counsel for the proposed defendants, a description of the arguments made to staff, and staff responses to the arguments.

The Director of Criminal Enforcement is to analyze all the related documents, assess the merits of the case, and recommend what action, if any, to bring against the proposed defendant(s). The documents are then to be reviewed by the Division's criminal DAAG. According to the Division manual, staff will ordinarily inform defense counsel that staff is seriously considering recommending indictment and give counsel an opportunity to present their views to the staff and section or office chief, or to the Director of Enforcement or the DAAG, before the indictment recommendation is forwarded to the AAG. At any time, the party may agree to plead guilty. Defense counsel do not have an absolute right to be heard by the Director of Criminal Enforcement or the criminal DAAG, although it is routine that they are.

If the DAAG (or the Director of Criminal Enforcement) does not concur in the recommendation to proceed with criminal prosecution, the criminal investigation is closed or, occasionally, sent back to the section or office to develop more evidence. If the criminal investigation is closed, occasionally, a civil investigation might be opened. If the DAAG (or the Director of Criminal Enforcement) concurs in the recommendation to proceed with criminal prosecution, the DAAG (or the Director of Criminal Enforcement) is to forward a recommendation to the Division's AAG. The

Division's AAG is to decide whether to bring a legal action or decline prosecution.

If the AAG does not approve the criminal prosecution, the criminal investigation is closed or, occasionally, sent back to the section or office to develop more evidence. Occasionally, if the criminal investigation is closed, a civil investigation might be opened. If the AAG approves criminal prosecution and the party has not agreed to plead guilty, the Division presents the recommended indictment to the grand jury. If the grand jury returns an indictment, the Division begins criminal proceedings in court. If the grand jury does not indict, the investigation is closed.

If the party has agreed to plead guilty, staff are to prepare a memorandum recommending filing an information and entering a plea agreement with a sentence recommendation. The memorandum is to be forwarded to the criminal DAAG through the Director of Criminal Enforcement if it is the first case to arise from an investigation, or to the Director of Criminal Enforcement if it is not the first case. The memorandum is to include the following informaiton:

- a brief description of the proposed charges;
- a description of the illegal conduct and an analysis of the available evidence demonstrating the existence of that conduct;
- a brief description of the elements of the proposed plea agreement, with a more detailed explanation of any unusual provisions, and an analysis of the potential criminal penalty pursuant to the United States Sentencing Commission's *Federal Sentencing Guidelines*;
- a description of the potential charges faced by the proposed defendant, had the case proceeded to indictment;
- an analysis of the benefits and disadvantages of the proposed plea agreement, including the impact of the proposed agreement on any continuing investigation or future trial; and
- a discussion of relevant victims' rights issues.

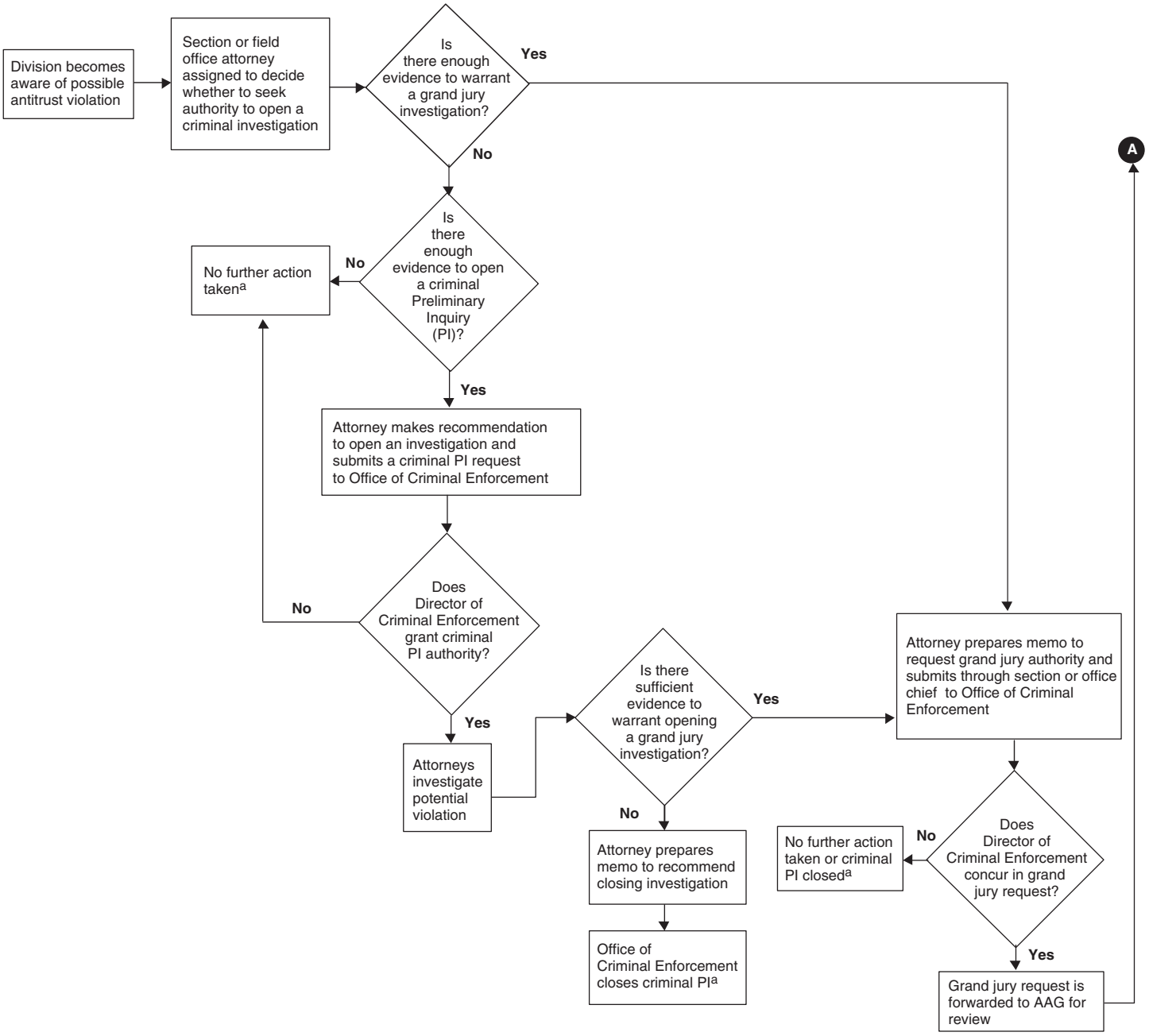
The DAAG is to review the memo and forward it to the AAG with a recommendation. If the AAG concurs with the recommendation, the

Division files the information, plea agreement, and sentence recommendation with the court.[39]

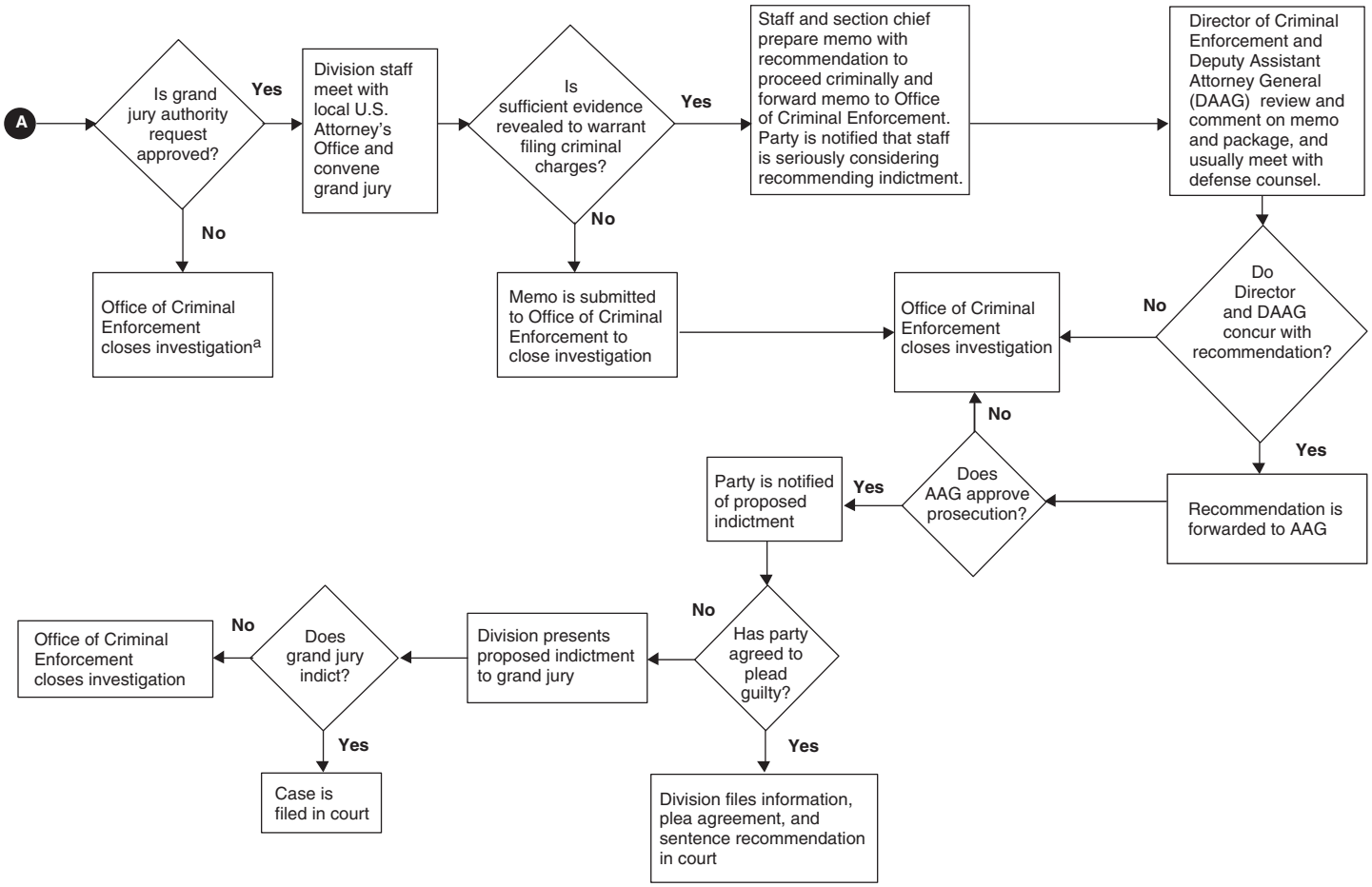
Figure 4 shows the general process the Division follows for criminal enforcement actions.

[39]Violation of the Sherman Act is a felony punishable by fines up to $350,000 and up to 3 years' imprisonment for each offense for individuals and fines up to $10 million for each offense for corporations. Under 18 U.S.C. 3571, the Alternative Fine Provision, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

**Figure 4: Flowchart of Antitrust Division's General Process for Criminal Enforcement**




[a]The Division may initiate a civil investigation or the matter could be returned to the section or office for further work.




Source: GAO developed based on Antitrust Division Manual and discussions with Division officials.

# Appendix IV: Characteristics of Matters for Which Only a PI Was Done

As shown in table 4 of our report, during fiscal years 1997 through 1999, the Division closed a total of 64 agriculture-related matters in the SIC codes we examined after conducting a PI. We reviewed opening and closing memorandums for all 64 matters to determine, among other things, (1) the source of these matters, (2) the geographic market and amount of commerce affected, (3) the SIC codes for these matters, (4) the number of days the matters were open, and (5) the reasons the matters were closed with no action beyond the PI phase.

For the 64 matters that were closed following the PI, 47 (73 percent) of the PIs were initiated as a result of HSR filings. Of the remaining matters, seven resulted from complaints received from the public; four were referred from another federal agency, including two from the Federal Bureau of Investigation (FBI), one from USDA, and one from FTC; two resulted from an investigation of a related matter; and two were self-initiated. In addition, there were two matters for which there appeared to be more than one source for the investigation. Table 9 summarizes how the Division became involved in each of the 64 matters.

**Table 9: Source of the Agriculture-Related Matters Closed at the End of the Preliminary Inquiry, Fiscal Years 1997 – 1999**

| Source of the matter | Number of matters | Percent of total matters |
|---|---|---|
| HSR filing | 47 | 73 |
| Complaint from the public | 7 | 11 |
| Referral from another agency[a] | 4 | 6 |
| Investigation of related matter | 2 | 3 |
| Self-Initiated | 2 | 3 |
| Other[b] | 2 | 3 |
| **Total** | **64** | **100**[c] |

[a]Two matters were referred from the FBI, one from USDA, and one from FTC.

[b]Other includes one matter for which we could not determine whether it was initiated as a result of a complaint or an HSR filing, and another for which we could not determine whether it resulted from a complaint or was self-initiated.

[c]Does not add to 100 percent due to rounding.

Source: GAO analysis of data from opening and closing memorandums.

Table 10 shows the distribution of these 64 matters by the geographic market and amount of commerce affected. Forty-three (67 percent) of the matters were regional[1] in scope, and the amount of commerce affected

[1]Regional means of a geographical scope less than national, such as Northeast or Midwest.

was not shown in the closing memorandums in 16 (25 percent) of the 64 matters. Of the 47 matters in which the amount of commerce was known, 12 (25 percent) involved commerce estimated at between $150 million and $499.9 million.

**Table 10: Geographic Market and Amount of Commerce Affected for Agriculture-Related Matters Closed at the End of the Preliminary Investigation, Fiscal Years 1997 - 1999**

| Geographic scope and amount of commerce affected | Number of matters | Percent of total matters |
|---|---|---|
| **Geographic scope of market** | | |
| Regional | 43 | 67 |
| National | 20 | 31 |
| International | 1 | 2 |
| **Total for geographic market** | **64** | **100** |
| **Amount of commerce affected** | | |
| $1,000,000 to $9,999,999 | 3 | 5 |
| $10,000,000 to $24,999,999 | 3 | 5 |
| $25,000,000 to $49,999,999 | 4 | 6 |
| $50,000,000 to $149,999,999 | 9 | 14 |
| $150,000,000 to $499,999,999 | 12 | 19 |
| $500,000,000 to $999,999,999 | 4 | 6 |
| $1,000,000,000 to $ 1,499,999,999 | 4 | 6 |
| $1.5 billion and over | 8 | 13 |
| Unknown[b] | 16 | 25 |
| Not completed | 1 | 2 |
| **Total for amount of commerce affected** | **64** | **100**[a] |

[a]Unknown indicates that at the time the PI memorandum was submitted, Division staff did not have information on the amount of commerce affected.

[b]Does not add to 100 percent due to rounding.

Source: GAO analysis of data from opening and closing memorandums.

Table 11 shows the breakdown of the primary SIC categories for each of the 64 PIs. As can be seen, food manufacturing is the largest overall category and accounted for 41 of 64 PIs. No other primary industry code had more than 5 PIs.

**Table 11: SIC Categories for Agriculture-Related Matters Closed at the End of the Preliminary Inquiry, Fiscal Years 1997 - 1999**

| SIC category | Number of matters | Percent of total matters |
|---|---|---|
| All crop production | 3 | 5 |
| All food manufacturing | 41 | 64 |
| All livestock production | 2 | 3 |
| Farm machinery | 2 | 3 |
| Food products | 1 | 2 |
| Retail food stores | 2 | 3 |
| Wholesale beverages | 1 | 2 |
| Wholesale farm supplies | 2 | 3 |
| Wholesale farm/garden | 1 | 2 |
| Wholesale farm/raw materials | 2 | 3 |
| Wholesale grocery | 5 | 8 |
| Multiple SIC codes | 2 | 3 |
| **Total** | **64** | **100**[a] |

[a]Does not add to 100 percent due to rounding.

Source: GAO analysis of data from opening and closing memorandums.

Table 12 shows the number of days the PI was open for each matter classification for matters closed after staff conducted a PI. According to the Division manual, the normal time period required to conduct a PI ranges from a few weeks to a few months. Table 12 shows that about 66 percent of the matters were closed within 3 months. All of the matters that closed within 3 months were HSR merger matters. The PI for each of the criminal matters lasted more than 6 months.

**Table 12: Number of Days Preliminary Inquiries Were Open for Agricultural Matters Closed at the End of the Preliminary Investigation, Fiscal Years 1997 – 1999**

| Number of days | HSR merger | Non-HSR merger | Civil nonmerger | Criminal | Total | Percent of total |
|---|---|---|---|---|---|---|
| 0 to 15 days | 12 | 0 | 0 | 0 | 12 | 19 |
| 16 to 30 days | 18 | 0 | 0 | 0 | 18 | 28 |
| 31 days to 3 months | 12 | 0 | 0 | 0 | 12 | 19 |
| Over 3 months to 6 months | 5 | 0 | 1 | 0 | 6 | 9 |
| Over 6 months | 5 | 1 | 2 | 8 | 16 | 25 |
| **Total** | **52** | **1** | **3** | **8** | **64** | **100** |

Source: GAO analysis of data from opening and closing memorandums.

As can be seen in table 13, 58 (91 percent) of these matters were closed because the Division found insufficient evidence of potential antitrust violations.

**Table 13: Reasons Agriculture-Related Matters Were Closed at the End of the Preliminary Investigation, Fiscal Years 1997 – 1999**

| Reason matter was closed | Number of matters | Percent of total matters |
|---|---|---|
| Insufficient evidence | 58 | 91 |
| Matter resolved | 4 | 6 |
| Parties abandoned merger | 2 | 3 |
| **Total** | **64** | **100** |

Source: GAO analysis of data from opening and closing memorandums.

# Appendix V: Comments From the Department of Justice, Antitrust Division

**U.S. Department of Justice**

Antitrust Division

*Patrick Henry Building*
*601 D Street, NW*
*Washington, DC 20530*

March 15, 2001

Mr. Richard M. Stana
Director, Justice Issues
General Accounting Office

Dear Mr. Stana:

The Antitrust Division appreciates the opportunity to respond to the General Accounting Office's (GAO) draft report on the Division's enforcement activities in agriculture-related markets. We ask that this letter be included in the body of the final report when it is published.

Because our comments are based on a draft of the report, some may not apply to the final report as it is issued. We are hopeful that many, if not all, of the issues raised in this letter will be taken into account by GAO as it prepares the final report.

As the thrust of GAO's draft report concerns the quality of the Division's record-keeping, this letter will address those issues first.

**The Matter Tracking System (MTS)**

The Division appreciates GAO's constructive guidance as we continue our ongoing efforts to further improve our data systems overall, and we will pursue many of its recommended suggestions. We acknowledge that improvements can always be made, but respectfully disagree with GAO's contention that information contained in the Division's MTS is unreliable. Throughout the GAO review process, we have had the opportunity to review extensively the MTS, what it contains, how well it tracks matters, and where improvements can be made. It is clear to us that, while data linkages can be improved and data coding reviewed to ensure consistency, the MTS is soundly structured, is logically presented, and contains fully reliable data.

There will unavoidably continue to be instances in which matter data maintained by the Division will not be as comprehensive as ideally desired, as the Division's tracked matters go back to 1933, when only limited amounts of data were recorded. Our tracking improved substantially in 1985 with the replacement of previous "hard copy" and nascent electronic tracking systems with a more comprehensive Automated Management Information System (AMIS). In February 1998, the Division replaced AMIS with MTS, in recognition of the greater sophistication of available computer systems and the need to track larger numbers of more complex matters. Currently,

MTS contains more than 46,000 unique matters, including about 8,400 matters that were migrated into MTS from the Division's former AMIS system; 23,000 matters in which the Division has been involved that were incorporated from various FTC systems; 6,500 historic matters entered from manual logs; 1,000 matters entered from a variety of other data sources, and 7,500 new matters keyed directly into MTS.

The MTS also adds new data categories not found in the previous data bases that were included to assist in improved Division management. We are gradually bringing our older matters into conformance with new reporting parameters and definitions and including new information as it becomes available and inaccuracies or gaps are discovered.

Given the wide range of data sources and the relatively recent inception of the MTS, we are not surprised to be discovering some minor discrepancies as the information in MTS is extensively used. To date, however, we are pleased with the quality of the data maintained in the system.

Contrary to GAO's contention (page 28) that "errors have been identified that have not been corrected," the MTS is updated promptly anytime erroneous information is detected or new data made available. This is critical to ensuring that the most accurate information possible is maintained at all times.

Also, contrary to GAO's contention (pages 9, 19, and 28) that Division information was "not accurate and reliable" because "actions were being taken on matters after the matter had been recorded as closed," and as explained repeatedly to GAO, it is essential at times to reopen previously "closed" matters. Occasionally, evidence not previously available to the Division becomes available at a later date, and the matter is reopened based upon this additional information. This is not, as GAO has supposed (page 19), an indication of an incorrect closure of a matter, but rather an appropriate recognition that as new information is available, it is essential that the Division reexamine specific matters to determine if sufficient evidence is available and violations of law have occurred.

The 25 matters found to be problematic by GAO (page 26), and upon which GAO appears to base a large amount of its concern about the Division's tracking system, came to the Division's attention toward the end of GAO's review process when the Division was asked to review a draft of Table 4. We found the proposed categories to be strange in a number of respects, and suggested various changes so the categories would be more accurately descriptive. The category used to describe the 25 matters, "Non-HSR matters handled by Justice for which a PI [preliminary inquiry] was not initiated," not only appeared strange, but was not very illuminating. To help GAO ensure the most accurate and descriptive presentation of data, we asked GAO for a list of the matters they had placed in this category. This was consistent with what we have done on numerous occasions to help GAO understand the Division's data and adapt it to GAO's review format.

Upon examining the list GAO provided, we found that, due to the lack of an appropriate link to the PI phase in the Division's records, **12** of the 25 matters in question were incorrectly shown in the data as not resulting in a PI. All 12 were originally entered into the Division's old AMIS system and later transferred in bulk with all other AMIS matters into the new MTS system. Another **two** of the 25 matters were matters cleared to Justice for a PI but for which the decision was ultimately made not to open a PI -- i.e., for which no link to a PI phase was missing. And the other **11** of the 25 were matters that do not as a rule ever involve a PI -- business review letters, requests for export trading certificates, and requests to modify or enforce previous judgments. We recommended that these 11 matters should not be listed in a category suggesting that the matter had stopped short of the PI stage, but should be placed in their own more descriptive categories, as GAO had already done in Table 4 for one business review and was proposing to do in Table 2, or should be placed in a separate "other" category that did not refer to a PI, such as GAO has done in the latest draft of Table 2 we have seen.

We are surprised at GAO's conclusion that finding links missing in 12 matters (out of the 1,050 in the data set) was alarming enough for them to question the entire database as "not wholly reliable," or to characterize the Division as seeking "preferential treatment" for them. We devoted considerable time to working closely with GAO staff throughout the review to ensure that all questions asked and issues raised were responded to promptly, and GAO staff indicated their satisfaction with any clarifications provided. Given the overall data set of 1,050 matters and our comprehensive review of them during this review, the missing links in the 12 matters do not provide a basis to believe that a substantial number of matter links are missing elsewhere. Nonetheless, we fully acknowledged that the 12 matters in which appropriate linkages to the PI phase did not initially exist in our database needed to be corrected, and we did so promptly. Moreover, we currently are reviewing how best to ensure that any similar linkage issues are identified and corrected as appropriate.

GAO's contention that the Division "does not have reliable information on the direct labor costs for each matter" also is not correct. During the course of the review, we advised GAO that we do have reliable cost information on matters contained in the GAO data set, but that this information cannot currently be obtained from one central source. We are, however, working diligently to provide a central source in the MTS that will allow "one stop shopping" for cost information. This ongoing effort includes linking the Division's recently completed (December 2000) on-line time accounting system into MTS, and the deployment of the Department's new FMIS2 Fiscal Reporting System (June 2000) with its more sophisticated ability to track each cost by matter number. Historical matter costs are more difficult to provide labor cost information for, but -- as we told GAO during its review, and as we have been doing for GAO in another audit of the Antitrust Division currently underway -- if GAO would like information on specific matters, it can be provided as needed. The Division continues to work towards realizing the plan of having matter cost information eventually centralized in the MTS and more readily available to Division management officials and others, including GAO, as necessary in the future.

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**The Correspondence Control Tracking System (CCTS)**

The Antitrust Division's CCTS was designed and initially implemented in 1997 as a means of recording controlled correspondence such as letters received from Members of Congress or referred by the President. Sections and field offices were encouraged to begin experimenting with using CCTS to record unsolicited citizen complaints as well, and to provide feedback on problems encountered and any suggestions for adapting CCTS to be more useful for this additional purpose. About one year ago, the Division's chief of staff asked all sections and field offices to move toward use of CCTS for tracking unsolicited citizen complaints, and in October 2000 the required use of CCTS for this purpose was formalized in Division directives. In November 2000, this Directive was modified to clarify that Division sections and field offices could continue to use supplemental complaint tracking systems to capture information determined to be valuable to pursuing complaints, but this is permitted only in addition to CCTS tracking, not in lieu of it.

Thus, when the draft report states (page 13) that "during the course of [GAO's] review, the Division took steps to improve its documentation of complaints and leads," it is referring to steps in the ongoing effort to implement CCTS in the sections and field offices beyond the recording of controlled correspondence, an effort that was initiated well before GAO began its review.

CCTS includes numerous data fields for recording a wide variety of information about citizen complaints. These data fields continue to be refined as we receive suggestions from Division users and others, such as GAO. In particular, it appears reasonable to add a specific data field for Standard Industrial Classification (SIC) codes, as GAO has suggested. The Division intends carefully to pursue ways to implement these recommendations and how best to use this data in managing its enforcement workload. This will also include consideration of linking CCTS to MTS to enable tracking of unsolicited citizen complaints.

**Other Comments**

There were numerous instances in which the draft report inaccurately described the antitrust laws or antitrust enforcement. We have brought these inaccuracies to GAO's attention, and GAO has been very responsive in indicating it will correct the majority of them in its final report. Knowing that the antitrust laws and antitrust enforcement processes are full of complexities that are difficult to describe in the space of a report such as this, we appreciate GAO's efforts to work with us to ensure that the descriptions in the report are as accurate as possible. While we remain hopeful that most if not all of the inaccuracies we have pointed out will be corrected in the final published report, we mention here a few examples of places in the draft report where the descriptions are either incorrect or incomplete. More generally, we would caution the reader against relying solely on this report as a description of the antitrust laws or antitrust enforcement, or for assessing the possibility of antitrust enforcement action, or as a guide for interacting with antitrust enforcers.

Investigation of Mergers Reported Under Hart-Scott-Rodino

In several places, the draft report may give the incorrect impression that if a merger filing under the Hart-Scott-Rodino process does not result in a preliminary inquiry being opened, the Division has taken no action. In fact, every proposed merger reported under the Hart-Scott-Rodino Act receives the review necessary to ensure that it is not likely to substantially lessen competition in violation of the antitrust laws. Short of opening a PI, the Division reviews the documents submitted by the parties, which are required to include with their filings substantial information about the proposed merger and its significance for competition in affected markets. Division attorneys and economists may also consult any publicly available sources of information, and may contact the merging parties directly to clarify information contained in the filings or to obtain additional information as necessary to make a determination on the merger.

Definition of "Agriculture"

The draft report refers in several places to the Division's development of a definition of "agriculture" to help GAO determine which matters to include in its review, intimating, perhaps, that it was a shortcoming on the Division's part that we did not already "have a working definition of the agriculture industry" (page 31). As we told GAO last spring when the SIC codes for its review were agreed upon, the Antitrust Division's investigatory authority covers all industrial sectors, except for an isolated few that are excluded by statute. Generally, as we told GAO, we do not have a law enforcement basis for creating a bright-line distinction between which kinds of enterprises relate to agriculture and which do not. As each matter arises, we investigate it on its own unique facts and determine who has the potential to be adversely affected from a competitive standpoint. Furthermore, as we told GAO, any attempt to draw such a bright line between industries that are important to agriculture and those that are not will unavoidably be under-inclusive in some respects and over-inclusive in others. We cautioned GAO that there were a number of different possible ways to approach a proper definition of agriculture for purposes of gathering statistics, all of which would have limitations.

For purposes of GAO's request, we went through the list of SIC codes to consider which would be appropriate to include. With GAO's concurrence, we undertook to define "agriculture-related enterprises" as those "specifically relating to plant and animal products that originate on land and are commercially cultivated or raised for human or animal consumption, consumption meaning oral ingestion." Nevertheless, we had to make a number of judgments in an attempt to follow this general conceptual definition. We cautioned GAO that others approaching the same question might well make different judgments and arrive at a somewhat different set of SIC codes.

We noted one particular example in which our best effort at a definition for GAO's statistical gathering purposes omitted a prominent enforcement action that would generally be considered agriculture-related. We decided it did not make sense to

include the broad category of chemicals, other than the specific SIC code for fertilizers and other agricultural chemicals. Clearly, many chemicals are important to agricultural production, processing, and marketing, but the other chemical SIC codes have far broader application than agriculture. For example, a subset of chemicals is drugs (Code 283), which includes many products with plant ingredients, and many products important in the production of livestock. Code 283 includes vitamins, which are an important feed additive and the subject of ongoing criminal investigations into the international vitamin cartel, which have already resulted in the two largest criminal fines in antitrust history. But because the vast majority of Code 283 concerns products neither made with farm-grown ingredients nor used directly in agricultural production, it made less sense to include the entire category than to exclude it. We cautioned GAO that because of complications like this, any set of SIC codes would be of limited use in arriving at a definitive definition of agriculture for any purpose beyond the specific one of giving GAO a method for requesting data from us on which to conduct this particular review.

Division's Interaction With USDA and FTC

GAO has agreed to revise the earlier draft's description of the Division's interaction with USDA and with the FTC, to give a fuller picture. In the latest draft we have seen, the description is essentially correct. It also bears mentioning, however, that in addition to the described interaction between the Division and the FTC on specific matters -- which is limited by design in order to help ensure the most efficient and effective use of enforcement resources and to reduce the burden on affected parties by avoiding duplication of effort -- there is extensive, ongoing, high-level interaction between the two agencies on broader antitrust enforcement policy issues.

Division Expertise

The statement in the draft report (page 7) that Division officials told GAO that "their expertise is in antitrust laws, not in specific industries," needs to be placed in proper context.

Early in its review, GAO asked Division officials how many attorneys worked on agriculture matters. We advised GAO that the Division's enforcement work was not organized around such a bright-line definition of agriculture, and that attorneys in many sections worked on matters that would be of interest to the agricultural community. We also told GAO that, although Division attorneys and economists accumulate considerable knowledge about the industries in which they conduct investigations, and particularly in the industries in which they specialize, their principal expertise is in the application of antitrust law and principles, and they are all therefore considered potentially available for assignment to any matter as the need arises. While we would not ordinarily claim to be the definitive experts in any industry on an ongoing basis, Division attorneys and economists certainly do become definitive experts as to the competitive functioning of the markets we investigate by the time we complete an investigation and reach a conclusion as to enforcement action.

Flow Charts

When the Division learned GAO was preparing flow charts to describe the various investigatory processes in the Division, we cautioned that any attempt to reduce these processes to flow charts would unavoidably give a false sense of rigidity and deconstruction to what are, in practice, dynamic processes. We worked with GAO on the flow charts and accompanying narrative to capture as accurately as possible the overall dynamic as well as the discrete steps. While the charts and accompanying narrative in Appendix III fairly describe a typical antitrust investigative process, we wish to emphasize that they must be read with the understanding that for any significant matter, there is ongoing consultation at all levels within the Division, including at the Deputy Assistant Attorney General and Assistant Attorney General levels.

Also, GAO has assured us that its stylistic use of the phrase "[someone] is to [do something]" in the narrative accompanying the charts is intended to describe how GAO has been told a step in a process typically occurs, and not to describe an ironclad requirement of how it must, without deviation, occur.

**Concluding Observations**

We are quite surprised and disappointed in the tone of the draft report, as we have devoted substantial time and effort to ensuring that GAO was provided the data it needed, promptly pursuing GAO's questions on data, and promptly correcting any data deficiencies when identified. We devoted the additional time and effort necessary in ensuring high-level management of the process and thorough familiarity with the information we were providing GAO. As explained to GAO during the review process, in moving AMIS data into MTS (as with the migration of most data systems containing significant quantities of data) appropriate links may, at times, have been missed. Additionally, in changing definitions and fields to improve future data collection, and during the transition of older matters into new coding, data can also be missed. This is not, however, indicative of a failed tracking system, nor a lack of commitment on behalf of the Division, but is inherent in systems transition and improvement.

The 25 matters highlighted by GAO, and apparently used as the basis for its conclusion that the Division's MTS system is flawed, were easily tracked by the Division following their identification by GAO. The linkages were promptly corrected in the Division's data, and GAO was advised of these corrections. We are surprised that GAO has used these 25 matters to reach its conclusions of significant problems with matter tracking in the Division.

The Division is thoroughly dedicated to ensuring that all of its resources are thoroughly tracked, that this information is available to Division managers in their management of the Division's resources, and that Division funding is used in the most efficient and effective manner possible.

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The Division is confident that all citizen complaints received were appropriately considered, and that any information giving us reason to believe that the antitrust laws may have been violated was appropriately investigated.

The Division is committed to effective antitrust enforcement in the agricultural marketplace as in the rest of the economy, and our commitment is demonstrated by our enforcement record in that marketplace, including the two highest criminal antitrust fines in history (as well as the fifth highest), and a number of successful major challenges in recent years to mergers threatening to harm competition in the grain business, in biotechnology, and in farm equipment.

Thank you again for the opportunity to respond to GAO's draft report. As always, we look forward to working with you in the future to ensure efficiency, effectiveness, and public accountability in government.

Sincerely,

Thomas D. King
Executive Officer

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# Appendix VI: GAO Contacts and Staff Acknowledgments

## GAO Contacts

Richard M. Stana, (202) 512-8777
William O. Jenkins, Jr. (202) 512-8777

## Acknowledgments

In addition to those named above, Chan My J. Battcher, Cathy Hurley, Jan Montgomery, Tim Outlaw, Anne Rhodes-Kline, Maria Strudwick, and Bonita Vines made key contributions to this report.

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